

REPORTER'S RECORD  
TRIAL COURT CAUSE NO. 04-CR-3453-C  
APPELLATE COURT CAUSE NO. AP-76,000 76 100  
VOLUME 11 OF 25 VOLUMES

THE STATE OF TEXAS ) IN THE DISTRICT COURT  
VS. ) 94TH JUDICIAL DISTRICT  
JOHN HENRY RAMIREZ ) NUECES COUNTY, TEXAS

INDIVIDUAL VOIR DIRE

On the 13th day of November, 2008, the  
following proceedings came on to be heard in the  
above-entitled and numbered cause before the HONORABLE  
BOBBY GALVAN, Judge Presiding, held in Corpus Christi,  
Nueces County, Texas:

Proceedings reported by Stenograph  
Machine.

**FILED IN**  
**COURT OF CRIMINAL APPEALS**

OCT 06 2009

**Louise Pearson, Clerk**

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## 1 PROCEEDINGS

2 November 13, 2008

3 THE COURT: When we were off the  
4 record, I was told that there is somebody maybe we can  
5 agree on?

6 MR. SKURKA: Yes, Your Honor. We've  
7 reviewed the questionnaire on Juror No. 39.

8 THE COURT: Okay.

9 MR. SKURKA: He did not finish his last  
10 five pages on the thing and he may have gone to school  
11 with Mr. Ramirez at Moody High School --

12 THE COURT: Okay.

13 MR. SKURKA: -- so both sides have agreed  
14 to excuse him.

15 MR. GARZA: That's correct, Your Honor.

16 THE COURT: All right. We called him off  
17 or we're going to try?

18 THE BAILIFF: Okay. Which juror?

19 MR. SKURKA: If you can call 39 and tell  
20 him he doesn't have to come. He's scheduled to come  
21 at 10.

22 THE COURT: Okay. We'll try and call him  
23 off.

24 All right, what else? We ready on the --  
25 on Mr. Yazdaninia?

5

1 MR. SKURKA: Yes, Judge.

2 THE COURT: All right. Now, you say that  
3 he's got an issue?

4 MR. SKURKA: He says that he has a sick  
5 mother in Iran, and he's got a trip planned to Iran in  
6 mid December.

7 THE COURT: Okay. We'll talk to him  
8 about it. All right, bring him in.

9 (Venireperson enters courtroom.)

10 THE COURT: All right.

11  
12 VENIREPERSON NO. 36,  
13 AHMAD YAZDANINIA,

14 VOIR DIRE EXAMINATION

15 BY THE COURT:

16 Q. All right. You are Mr. Yazdaninia?

17 A. Yes, sir.

18 Q. All right. Mr. Yazdaninia, we're going to  
19 talk to you about a few things. First and foremost, I  
20 understand that you have a trip overseas.

21 A. Yes, sir, that I attend every year.

22 Q. Okay.

23 A. Because of my ill mother that I visit every  
24 year.

25 Q. Okay. Well, I certainly can understand that.

6

1 A. Yes, sir.

2 Q. When are you planning to leave?

3 A. Well, I usually leave, according to that,  
4 what I take my day off, personal day off from school.  
5 I work for C.C.I.S.D. I'm a teacher at Grant Middle  
6 School. And I talked to my principal, if it's  
7 possible I can leave before the holiday starts, so a  
8 week before holiday starts.

9 Q. Okay. So when is that?

10 A. Well, I mean, our holiday is to -- this year,  
11 I think it starts at December 14, I believe, or  
12 something like that, but I'm intending to, you know,  
13 to leave at that time. I did not want to talk to you  
14 about it because I haven't gotten my ticket, due to  
15 financial problem that I have, so, I mean, I just need  
16 some money to -- to travel, so...

17 Q. So you are going to -- you plan to leave on  
18 December the 14th.

19 A. The 14, something like that, 14, or maybe  
20 earlier, maybe later, but I have to go. Somehow I  
21 need to get to see her.

22 Q. No, I -- look, look, I mean, if your mother's  
23 ill, I mean, there's nobody here that wants to prevent  
24 you --

25 A. No, I understand --

7

1 Q. -- from going.

2 A. -- but I have proof that I can -- that I've  
3 been there the last five, six years.

4 Q. No, I believe you.

5 A. Yes, sir.

6 Q. We're not --

7 A. No, I'm here, sir. Sir, if I -- if I can  
8 help in any way I'll be glad to serve, I have no  
9 problem --

10 Q. Okay.

11 A. -- to do my civic duty, yes, sir.

12 Q. Okay. Well, here's kind of the deal.

13 A. Yes, sir.

14 Q. I don't expect this case would be going -- I  
15 think it's -- we're going to start December the 1st.  
16 Let's see here, that week -- I think December the 1st  
17 is actually a Monday. Let's see here, december the  
18 1st is a Monday, and I can tell you that first week  
19 through the 5th, we're going to be working, for sure.

20 A. Yes, sir.

21 Q. Okay? And -- and then we might be working  
22 through part or maybe even all of the next week, but I  
23 think we'll be done by the 12th.

24 A. Yes, sir.

25 MR. SKURKA: I agree, Judge.

8

1 THE COURT: You think so?  
 2 MR. SKURKA: Yes, sir.  
 3 THE COURT: I -- what do you guys think?  
 4 MR. JONES: I'm sorry, I'm --  
 5 THE COURT: Well, he says he's leaving on  
 6 the 14th. I think we'll be done by the 14th, myself.  
 7 But, I mean, you guys know the evidence better than I  
 8 do.  
 9 MR. JONES: But --  
 10 THE COURT: If you don't think so --  
 11 MR. JONES: -- the problem is, the end of  
 12 the -- the end of the case, just because of the kind  
 13 of case it is, may be the most critical --  
 14 THE COURT: Uh-huh, I agree.  
 15 MR. JONES: -- part.  
 16 THE COURT: Okay.  
 17 MR. JONES: We don't know how long the  
 18 deliberations will last.  
 19 THE COURT: Okay.  
 20 MR. JONES: And any time lawyers estimate  
 21 how much time it's going to take, it usually takes  
 22 longer, so...  
 23 THE COURT: Well, we're hoping it's a  
 24 week.  
 25 MR. JONES: But given his -- his

9

1 situation with his parent, I'm --  
 2 THE COURT: Well, you want to talk about  
 3 this for a second?  
 4 MR. JONES: Well, I mean, he would be  
 5 distracted, I think. He'd be worried about it.  
 6 THE COURT: Well --  
 7 MR. JONES: Plus, he's -- if he's going  
 8 to be spending -- his airline tickets are going to be  
 9 --  
 10 THE COURT: He hasn't -- he hasn't bought  
 11 it, though.  
 12 MR. JONES: No, but if he gets it, it's  
 13 going to be an expensive ticket.  
 14 THE COURT: Yeah, no, I agree.  
 15 MR. JONES: And you can't -- he's going  
 16 to have problems, you know, rescheduling --  
 17 THE COURT: Okay.  
 18 MR. SKURKA: May I follow-up just on that  
 19 area?  
 20 THE COURT: Yeah, yeah. Why don't you  
 21 talk to him --  
 22 MR. SKURKA: Okay.  
 23 THE COURT: -- about it?  
 24  
 25

10

1 VOIR DIRE EXAMINATION  
 2 BY MR. SKURKA:  
 3 Q. Hi, Mr. Yazdaninia. Did I say it right?  
 4 A. It's close, sir.  
 5 Q. Close enough.  
 6 A. Yes, sir.  
 7 THE COURT: Close enough.  
 8 Q. (BY MR. SKURKA) So I don't feel bad. My name  
 9 is Skurka, and people have --  
 10 A. Yes, sir.  
 11 Q. -- trouble with that, too, so I'm --  
 12 A. Yes, sir.  
 13 Q. -- used to calling me Mark. How about that?  
 14 A. Yes, sir. And you call me Yaz, sir, Y-a-z.  
 15 The kids call me Yaz, Mr. Yaz.  
 16 Q. Mr. Yaz.  
 17 A. Y-a-z, yes, sir.  
 18 Q. Well, that makes it easy for all of us.  
 19 A. Much easier for all of us, yes, sir.  
 20 Q. We appreciate it.  
 21 A. Yes, sir.  
 22 Q. Let me -- let me get to the -- the gist of  
 23 the thing. You're -- you haven't bought a ticket,  
 24 yet, correct?  
 25 A. No, sir.

11

1 Q. You think -- or you're planning on leaving on  
 2 the 14th, which I think is a Sunday.  
 3 A. Yes, sir.  
 4 Q. Because it would be the end of the second  
 5 week.  
 6 A. Uh-huh.  
 7 Q. What we have here is a trial --  
 8 A. Yes, sir.  
 9 Q. -- that may take a week, probably, for sure,  
 10 but I don't think it's going to go much into the  
 11 second week.  
 12 A. Yes, sir.  
 13 Q. And if it does, it's not going to take the  
 14 whole week, --  
 15 A. Yes, sir.  
 16 Q. -- I don't believe. And that's just based  
 17 on, like, the attorney says, --  
 18 A. Yes, sir.  
 19 Q. -- a guess.  
 20 A. Yes, sir.  
 21 Q. And so I can almost -- my -- my suggestion  
 22 is, I would think 99 percent we'll be through by the  
 23 14th.  
 24 A. Yes, sir, I understand.  
 25 Q. Okay? So, here's the question.

12

1 A. Uh-huh.

2 Q. If you can -- if you're going to leave on the  
3 14th and we can be through, can you sit on this jury?

4 A. The main thing, sir, again, as I've said, I  
5 would like to do my civic duty. I've been on a civil  
6 suit --

7 Q. Uh-huh.

8 A. -- and I enjoyed being in that, really. But  
9 the main thing in here for me is -- is my mother's  
10 situation is that she's incapacitated. She cannot  
11 move, she cannot do anything on her own. And,  
12 actually, my family and a nurse taking care of her.

13 Q. I see.

14 A. And the main thing in my mind is pretty  
15 much -- like last night I was on the phone. They  
16 constantly call me and talk to me. And usually the  
17 phone calls are like after 12:00 because that's the  
18 only way they can get hold of me. And usually up 2,  
19 3:00, something, 2:00, an hour, two hours talking to  
20 them, just because that's mother. I mean, I'm sure we  
21 all have mother to think about, you know, at this age  
22 more think about them, and so I don't have -- my  
23 father passed away awhile back, and -- and the main  
24 thing it is, I'm just worried about it. It's just not  
25 that I don't want to, but that's what, as I mentioned

13

1 on the -- on the form, that my concern's in her, and  
2 if something happened I need to go, and that's part --  
3 and my mind needs to be set. And I know that you  
4 mentioned something about open-minded.

5 Q. Uh-huh.

6 A. I do remember that, sir, I'm a teacher. And  
7 -- and I know being open-minded thing in jury case  
8 like this, you know, you got to have open-minded. And  
9 in my mind occupied with, you know, problem that I  
10 have over there, you know, because of my mother it's  
11 going to be a little bit tough for me. I can try. I  
12 mean, I'm -- again, as I said, whatever you-all set  
13 for me's is fine, but --

14 Q. And that's what we're trying to say, too.

15 A. Yes, sir.

16 Q. I'm so sorry about your mother's situation --

17 A. Yes, sir.

18 Q. -- but I can't really tell --

19 A. Yes, sir.

20 Q. -- if it's a thing that's been that way for a  
21 long time --

22 A. Yes, sir.

23 Q. -- or it's getting steadily worse.

24 A. Yes, is -- is getting steadily worse.

25 Q. Okay.

14

1 A. My mother's situation is getting worse.

2 That's the problem, they're constantly taking her to  
3 the hospital, bringing -- since two or three years  
4 ago, I know that her heart problem, part of her body  
5 is -- is not movable, at all. That's why she's not --  
6 cannot even go to the rest room -- bathroom.

7 THE COURT: She's pretty sick, at this  
8 point.

9 VENIREPERSON NO. 36: Pretty much sick,  
10 yes, sir.

11 Q. (BY MR. SKURKA) So -- so what you're saying  
12 is, unfortunately something may happen during the next  
13 two weeks that you may have to leave early.

14 A. Yes, sir. I might be --

15 Q. Is that what you're saying?

16 A. Yes, that's what I'm saying. But, again, as  
17 I said, I really -- I mean, I could have, you know, I  
18 could have buy the ticket, but I -- I didn't have  
19 money to buy it. I'm trying to find, because of  
20 financial problem that I have, and that's another  
21 case. I would have gone earlier if I could find the  
22 money, but my main thing concerns really to serving is  
23 just like my mind as, again I mentioned, open-minded,  
24 it just got to have free mind to sit and listen to all  
25 the argument that going on in here and --

15

1 Q. So you think --

2 A. -- and make up your mind.

3 Q. So you think --

4 A. That's all.

5 Q. -- because of your mom's situation, that  
6 might interfere with you being on the jury.

7 A. That's what I'm trying to say. And the main  
8 thing, I have pretty much when they call me, I'm up to  
9 1, 2:00 in the morning and next day I need to be in  
10 here, a matter of being tired and, you know, concerns  
11 about that situation. Beside that one, there's no  
12 other concerns that I have, sir.

13 Q. Well, we think you'd make a fine juror, but  
14 we don't think -- we don't want to really interfere  
15 with your situation with your mom.

16 A. Well, thank you very much, and hopefully any  
17 time that, I mean, --

18 THE COURT: All right.

19 A. -- if I can come back and be a part of it,  
20 I'll be, you know --

21 THE COURT: All right.

22 Q. (BY MR. SKURKA) We understand. And what you  
23 said is exactly right, this is such an important case

24 --

25 A. Yes.

16

1 Q. -- we want people to be focusing on it.

2 A. Yes, sir.

3 Q. And, unfortunately, you've got some personal

4 things.

5 A. Absolutely.

6 Q. Thank you for bringing that to our attention.

7 A. Thank you, sir. Appreciate it. Thank you,

8 sir.

9 THE COURT: Okay. Mr. Yazdaninia, we're

10 going to do this, if it's okay, I think it's okay with

11 both sides.

12 MR. GARZA: Yes.

13 THE COURT: We're going to let you go --

14 VENIREPERSON NO. 36: Yes, sir.

15 THE COURT: You're not going to make it

16 on this jury. Maybe in the future --

17 VENIREPERSON NO. 36: Yes, sir.

18 THE COURT: -- you may be in a better

19 situation to serve --

20 VENIREPERSON NO. 36: Yes, sir.

21 THE COURT: -- and we certainly want you

22 to be, okay?

23 VENIREPERSON NO. 36: Thank you very

24 much, Judge.

25 THE COURT: But we appreciate you coming

17

1 down here --

2 VENIREPERSON NO. 36: Thank you.

3 THE COURT: -- and talking to us and

4 being honest with us about things, --

5 VENIREPERSON NO. 36: Thank you very

6 much.

7 THE COURT: -- okay?

8 VENIREPERSON NO. 36: Appreciate it.

9 Thank you, sir.

10 THE COURT: All right.

11 VENIREPERSON NO. 36: Is that it?

12 THE COURT: If you need a work excuse --

13 VENIREPERSON NO. 36: Yes, sir.

14 THE COURT: -- my bailiff can help you

15 with that.

16 VENIREPERSON NO. 36: Thank you very

17 much, sir.

18 THE COURT: Thank you for coming, Mr.

19 Yazadaninia.

20 MR. SKURKA: Thank you, sir.

21 (Venireperson exits courtroom.)

22 MR. SKURKA: Judge, for the record, --

23 THE COURT: Agreed strike?

24 MR. SKURKA: -- the State will agree to

25 excuse Juror No. 36.

18

1 THE COURT: All right.

2 MR. JONES: That's...

3 THE COURT: That's fine. You know, I'm

4 afraid if his mom gets sick, then we've lost a person.

5 MR. JONES: Yeah, right.

6 MR. SKURKA: And that's why I wanted to

7 follow-up, because he didn't have plane tickets

8 bought. I couldn't really tell if she was just in the

9 nursing home and he goes to visit her every so often,

10 or if she was really going downhill, but it sounds

11 like she's going downhill.

12 THE COURT: All right. We have the next

13 person, Lonnie Johnson (sic).

14 THE BAILIFF: Yes, sir.

15 THE COURT: Okay.

16 (Venireperson enters courtroom.)

17 THE COURT: All right. Come forward.

18

19 VENIREPERSON NO. 38,

20 LONNIE RAY JOHNSTON, III,

21 VOIR DIRE EXAMINATION

22 BY THE COURT:

23 Q. You are Lonnie Johnston?

24 A. Yes, sir.

25 Q. All right. We're going to talk to you about

19

1 a few things, okay?

2 A. Okay.

3 Q. We're looking to pick a jury here.

4 Obviously, you know that.

5 A. Yes, sir.

6 Q. And what we're looking for is people that can

7 keep an open mind.

8 A. Of course.

9 Q. All right? Because it's not fair, otherwise,

10 right?

11 A. No.

12 Q. You agree with that?

13 A. Of course not, yes.

14 Q. And we want people that can keep an open

15 mind, and we want people that can follow the law. So,

16 let me ask you question number one, can you keep an

17 open mind in this case?

18 A. Yes, sir.

19 Q. Okay. Have you made up your mind about this

20 case one way or the other?

21 A. No, I have not.

22 Q. All right. All right, then, let's talk about

23 the law. You have never been on a criminal jury

24 before.

25 A. No, sir.



20

1 Q. Okay, that's okay. We're going to talk to  
2 you a little bit about what -- what it's about. And  
3 that is, first of all, in every criminal case in this  
4 country the burden of proof is on the State, that is,  
5 the State's brought the charges and the law says,  
6 "State, you bring the charges, that's fine, but you  
7 got to prove them because you brought them."  
8 A. Yes, sir.  
9 Q. You agree with that?  
10 A. Yes, sir.  
11 Q. Okay. And the burden of proof -- you've  
12 heard of it, I'm sure, you probably remember it from  
13 school and you've seen it on T.V., and stuff like that  
14 -- is beyond a reasonable doubt. You ever heard of  
15 that before?  
16 A. Yes, sir.  
17 Q. All right. So beyond a reasonable doubt.  
18 Now, we don't have a definition, but it is the highest  
19 burden that we have in the law, okay?  
20 A. Okay.  
21 Q. And you agree that -- well, that's the law,  
22 okay? Could you hold the State to that burden?  
23 A. Yes, I would.  
24 Q. All right. Now, it doesn't mean beyond all  
25 doubt or beyond a shadow of a doubt, but it does -- it

21

1 is -- it is -- it's not just, you know, kind of sort  
2 of, all right?  
3 A. Yeah.  
4 Q. It's more than that.  
5 A. Of course.  
6 Q. Okay, you could hold the State to that.  
7 Now, as part of the concept that the  
8 State's got the burden of proof. Obviously, a person  
9 -- if they've got the burden of proof, then a person's  
10 innocent until they can prove it, right?  
11 A. Yes.  
12 Q. Okay. And that's what the law says. The law  
13 says, "State, you got the burden of proof and until  
14 you prove it, if you can prove it, you may not be able  
15 to, but until you can prove it every person in this  
16 country is innocent until proven otherwise." You  
17 agree with that?  
18 A. Yes, I do.  
19 Q. Okay. All right. And you could -- and --  
20 and you could presume the Defendant in this case to be  
21 innocent until they prove otherwise.  
22 A. Yes, sir.  
23 Q. If they can.  
24 A. That is true.  
25 Q. All right. Now, intertwined with all of this

22

1 is the idea that the burden of proof never shifts. In  
2 other words, the Defense never has any burden to do  
3 anything. You follow me?  
4 A. Yes, I -- Defense doesn't have to prove  
5 anything.  
6 Q. Defense doesn't have to prove anything. They  
7 don't have to put on any evidence, okay? That's what  
8 the law says. And now some people say, "Well, I like  
9 to hear both sides of the story," but it's not like  
10 that because it's not about both sides of the story,  
11 because you brought the charges and you got to prove  
12 them, right?  
13 A. Of course.  
14 Q. Okay. So we're not -- you know, it's not  
15 exactly like that. So, as part of that, the Bill of  
16 Rights of our U. S. Constitution says Defendant  
17 doesn't have to take the stand, all right? And I  
18 submit there's lots of reasons why that may be true,  
19 okay? Maybe -- maybe his lawyers say, "You know what,  
20 we advise you not to take the stand because they  
21 haven't proven their case," okay.  
22 Maybe Defendant is just not -- just isn't  
23 an eloquent speaker. You know, he's not educated,  
24 maybe he's -- maybe he just freezes up in high-stress  
25 situations. And you can understand why that would be

23

1 a high-stress situation.  
2 A. Of course.  
3 Q. Okay?  
4 A. Oh, yes.  
5 Q. You might even be a little nervous yourself  
6 sitting there. Maybe not.  
7 A. A little.  
8 Q. A little, right?  
9 A. Of course.  
10 Q. Yeah. And you're not on trial.  
11 A. No, exactly.  
12 Q. Okay? So, you know, there's lots of reasons  
13 why a person may not want to testify, all right?  
14 Would you -- could you follow the law that said a  
15 Defendant does not have to testify and the jury can't  
16 hold it against him?  
17 A. If that's what the law states.  
18 Q. That's what the law states. Not only does it  
19 say he doesn't have to testify and they can't make  
20 him, but you can't go back there to deliberate and  
21 say, "You know what, I'm -- I would have to hear from  
22 him and if I don't hear from him, Mr. Skurka, you  
23 get," that's the prosecutor over here, "Mr. Skurka  
24 gets a star and so I'm going to tip the scales this  
25 way for him." Can't do that.



<p style="text-align: right;">24</p> <p>1 A. No, sir.</p> <p>2 Q. You wouldn't do that?</p> <p>3 A. No, no.</p> <p>4 Q. Okay. All right. Let's talk a little bit</p> <p>5 about the kind of case this is --</p> <p>6 A. Okay.</p> <p>7 Q. -- and the process. This is a capital murder</p> <p>8 charge, okay?</p> <p>9 A. Yes, sir.</p> <p>10 Q. And -- and that means that it is the type of</p> <p>11 murder in which the death penalty can be a punishment.</p> <p>12 A. Yes, sir.</p> <p>13 Q. All right. It can be triggered. But I think</p> <p>14 it's a common misconception that every -- people think</p> <p>15 that every murder is a capital, okay? You -- you seem</p> <p>16 to understand that that's not the case.</p> <p>17 A. Yes, sir.</p> <p>18 Q. All right. There's plain murder, which I</p> <p>19 kind of hate saying. I just haven't figured out a</p> <p>20 better way to say it, but there's plain murder, which</p> <p>21 is the intentional taking of another's life, and then</p> <p>22 there's capital murder. And there's a laundry list</p> <p>23 that the legislature has given us as to situations of</p> <p>24 murder in which capital -- is capital murder, okay?</p> <p>25 In this case, what -- and I like to call</p>	<p style="text-align: right;">26</p> <p>1 or eight out of the elements and not prove all nine.</p> <p>2 I don't know how many there are, but, you know,</p> <p>3 there's -- there's a number of them. They don't just</p> <p>4 get to get pretty close.</p> <p>5 A. Yeah.</p> <p>6 Q. They have to get them all.</p> <p>7 A. Yeah.</p> <p>8 Q. You -- you could hold them to that burden.</p> <p>9 A. Oh, yes.</p> <p>10 Q. All right. Now, in -- in Texas we have</p> <p>11 what's called a "bifurcated system," all right? What</p> <p>12 does that mean, all right? That means that there's</p> <p>13 two parts to the trial, okay? First part is guilt or</p> <p>14 innocence. That is, the State tries to prove to the</p> <p>15 jurors that Defendant's guilty of the charge they've</p> <p>16 brought, --</p> <p>17 A. Yes, sir.</p> <p>18 Q. -- okay? If they are unsuccessful and the</p> <p>19 jury finds the Defendant not guilty, the case stops.</p> <p>20 If however, they're successful and -- then we go on to</p> <p>21 the punishment phase, which is the second part of the</p> <p>22 trial.</p> <p>23 In the second part of the trial, if the</p> <p>24 Defendant is found guilty of capital murder, there's</p> <p>25 two possibilities, life in prison or death, okay?</p>
<p style="text-align: right;">25</p> <p>1 it murder plus, okay? Think of it as murder plus.</p> <p>2 A. Okay.</p> <p>3 Q. In this case, the State is alleging murder,</p> <p>4 plus, while in the course of committing or attempting</p> <p>5 to commit a robbery, in the forcible taking of</p> <p>6 something --</p> <p>7 A. Yes.</p> <p>8 Q. -- from another, okay?</p> <p>9 A. Okay.</p> <p>10 Q. So they have to prove the whole thing. They</p> <p>11 don't get to say -- you don't -- they don't get to</p> <p>12 say, "Well, we've proven you the murder, but the</p> <p>13 robbery part..."</p> <p>14 A. Yeah.</p> <p>15 Q. Okay? Now, he may be guilty of murder or he</p> <p>16 may be guilty of robbery or he may not be guilty of</p> <p>17 anything, okay? But what I'm saying is this, they</p> <p>18 have to prove each and every element of the offense of</p> <p>19 capital murder for them to get a conviction for</p> <p>20 capital murder. You follow me?</p> <p>21 A. Yes, sir.</p> <p>22 Q. Okay. Could you hold them to that -- to that</p> <p>23 burden?</p> <p>24 A. Yes, sir.</p> <p>25 Q. In other words, they don't get to prove seven</p>	<p style="text-align: right;">27</p> <p>1 It's not just -- it's not just death automatically or</p> <p>2 life automatically, okay?</p> <p>3 A. Yes, sir.</p> <p>4 Q. But you don't say life or death. The jury</p> <p>5 doesn't -- I mean, most cases, like, let's say it was</p> <p>6 a regular murder, the jury would come back with a</p> <p>7 punishment, maybe a number of years, maybe probation,</p> <p>8 maybe a fine would be added, maybe a combination of</p> <p>9 those, okay? But we don't do that in capital murder.</p> <p>10 Capital murder we answer questions, okay? And here's</p> <p>11 the first question, they call it "Special Issues."</p> <p>12 "Is there a probability the Defendant would commit</p> <p>13 criminal acts of violence that would constitute a</p> <p>14 continuing threat to society," okay?</p> <p>15 A. Okay.</p> <p>16 Q. Okay. And the jury would answer yes or no,</p> <p>17 then you go on to Special Issue No. 2, "After taking</p> <p>18 into consideration all of the evidence, including the</p> <p>19 circumstances of the offense," that's the first part</p> <p>20 of the trial, okay, the guilt or innocence part, and</p> <p>21 then, "the Defendant's character and background and</p> <p>22 the personal moral culpability of the Defendant, is</p> <p>23 there a sufficient mitigating circumstance or</p> <p>24 circumstances to warrant a sentence of life</p> <p>25 imprisonment, rather than death sentence be imposed?"</p>

28

1 Okay?

2 And what is this all about? Well, the  
3 first part of the trial, you're just going to hear  
4 about whether the State can prove that this Defendant  
5 is guilty beyond a reasonable doubt or not guilty.  
6 And you're pretty much just going to hear about what  
7 happened that day, okay, if they can -- see what they  
8 can -- prove that -- what they've alleged that day.

9 A. Yes, sir.

10 Q. Unclear at this point because we haven't  
11 heard anything, okay?

12 A. Of course.

13 Q. The second part of the trial you may hear  
14 other things, like, I don't know, about his  
15 background, maybe his criminal history. What kind of  
16 guy was he? Is he a good guy? Is he a bad guy? Does  
17 he do work for the community? Is he -- is he  
18 generally a good person to his fellow man, all right?

19 A. (Nods head.)

20 Q. And -- and then you can decide whether taking  
21 into consideration everything, sort of like a global  
22 look, okay?

23 A. Okay.

24 Q. Not just that day, but everything.

25 A. Yes.

29

1 Q. Everything about the person. Does it -- does  
2 -- you know, these -- are there enough mitigating  
3 circumstances or, you know, that -- that warrant a  
4 life sentence, rather than a death sentence? All  
5 right? And then the jury would answer yes or no to  
6 that question, okay?

7 A. Okay.

8 Q. Now, I need to know from you -- well, let me  
9 -- let me tell you this. At the beginning of every  
10 trial, I give the jurors an oath, and that oath goes  
11 something like this, "Do you solemnly swear that you  
12 will render a true verdict based upon the law and the  
13 evidence," and then the jury says, "Yes." But I need  
14 to ask you, can you take that oath, first of all, to  
15 render a true verdict on the guilt or innocence phase,  
16 based upon the law and the evidence presented to you?  
17 Can you do that?

18 A. Yes, sir.

19 Q. Okay. And then I need to ask you on these  
20 two questions. And before you answer, I want to tell  
21 you, some people tell me, "I just -- you know, I could  
22 participate perhaps in the guilt or innocence phase,  
23 but I can't get to this phase. I can't participate  
24 and I can't take your oath because I cannot answer  
25 questions that may lead to someone's death, okay? I

30

1 can't do that myself."

2 A. Of course.

3 Q. Or, some people say, "Look, if I -- I could  
4 also participate in the guilt or innocence phase, but  
5 if he gets convicted of capital murder, I don't care  
6 about these special issues. I'm going answer them in  
7 such a way I think somebody that gets convicted of  
8 capital murder should always get death, no matter  
9 what," okay? Those people can't take the oath, all  
10 right?

11 A. Of course not.

12 Q. Okay. I'm asking you, can you take the oath  
13 and truthfully answer these questions if we get to  
14 that point?

15 A. Yes, sir.

16 THE COURT: Okay. All right, I'm going  
17 to turn the floor over to Mr. Skurka, and he's the  
18 prosecutor for the State. He gets to go first because  
19 he's got the burden of proof.

20 VENIREPERSON NO. 38: Okay.

21 VOIR DIRE EXAMINATION

22 BY MR. SKURKA:

23 Q. How you doing today, Mr. Johnston?

24 A. I'm doing good, how are you?

25 Q. My name is Mark Skurka. I'm an assistant

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1 district attorney, and the young man that was with me  
2 a few minutes ago is Geordie Schimmel. He's also an  
3 assistant D.A. He's the one that's assigned to Judge  
4 Galvan's Court, so he's going to be helping me present  
5 the evidence in this case if you get selected on this  
6 jury, okay?

7 A. Yes.

8 Q. I want to start off by saying there's no  
9 right or wrong answers. All you have to do is tell us  
10 how you feel. I don't want you to answer in such a  
11 way you think I want to hear it or the Judge wants to  
12 hear it or they want to hear it. I just want to know  
13 how you truly feel about something, okay?

14 A. Of course, yes, sir.

15 Q. Fair enough. When you first heard -- when  
16 you first heard it was a capital murder case or you  
17 heard there may be a death penalty case, remember that  
18 first day when you walked in and found out it was that  
19 kind of case, what was your first reaction?

20 A. My first reaction, I didn't really know what  
21 to think because I -- I know nothing about the case,  
22 as far as anything goes so I just knew it was a  
23 capital murder trial, and I didn't even know what the  
24 -- what the punishment would be, you know, but...

25 Q. Yeah, capital murder means there's a chance

1 for death penalty.

2 A. Yes.

3 Q. And the Judge, I think, told you that pretty  
4 soon when he first came in --

5 A. Yes.

6 Q. -- and he said it's a capital --

7 A. Yes.

8 Q. -- murder case. When you heard it was that  
9 kind of case and you may have to sit on that type of  
10 jury, what was your reaction?

11 A. I didn't -- I didn't, like, shy away from it.  
12 I feel it's like our duty to serve on a -- on a jury.  
13 And we have to be open-minded, and I...

14 Q. Okay. Did you see other people around you in  
15 the audience react? They all reacted differently,  
16 didn't they?

17 A. Of course, everybody's going to have a  
18 different reaction when it's this type of case.

19 Q. Right. And I saw -- and I was watching them,  
20 because I saw some people going like, "Oh, my gosh, I  
21 can't believe I got this kind of case," --

22 A. Yes, sir.

23 Q. -- and then some people said "Well, that's  
24 interesting, but, you know, I got to serve and do what  
25 I got to do."

1 A. Yes, sir, it's our duty.

2 Q. Is that kind of how you felt?

3 A. Yes, sir.

4 Q. Okay. Because sometimes people say -- and  
5 it's okay to say this, they say, "Well, look, if, you  
6 know, I thought it was going to be a D.W.I. case or a  
7 burglary case. And, my gosh, now, I'm going to have  
8 to make this kind of decision, I can't do that. I  
9 can't sit on that kind of case." Did you feel that  
10 way?

11 A. No, sir.

12 Q. Why not?

13 A. I don't know, I just -- it didn't bother --  
14 it didn't bother me, like -- I don't know, I -- I just  
15 didn't feel like I couldn't make the choice. I felt  
16 that if I was selected, I'd make the right choice  
17 according to the facts that are presented.

18 Q. That's a good answer because that's the way  
19 you should do it, make a decision based on the facts  
20 that's presented. You didn't come in with any  
21 preconceived notion, right?

22 A. No.

23 Q. You didn't say, "Well, I know he must be  
24 guilty because he looks guilty," did you?

25 A. Oh, no, of course not.

1 Q. And you understand that you have to wait  
2 until you hear everything before you make such a  
3 decision.

4 A. Oh, of course.

5 Q. But make no mistake, I told you the very  
6 first day, the State is going to seek the death  
7 penalty. If you're seated on this jury, there's going  
8 to be a time that sometime in this trial when I'm  
9 going to stand before you and ask you to find him  
10 guilty, based on the evidence. And I'm going to ask  
11 you to answer the questions in such a way that that  
12 guy gets the death penalty. And we're not talking  
13 about somebody you just, you know, hear about on the  
14 news. There he is, right there in that shirt.

15 A. Yes.

16 Q. Look at him and tell me, can you participate  
17 in that decision if it calls for it?

18 A. Yes, sir.

19 Q. Okay. No hesitation there.

20 A. (Shakes head.)

21 Q. Okay. It's not something that people want to  
22 do, are happy to do.

23 A. Of course not.

24 Q. But you understand as part of our Judicial  
25 Justice System, we need people to come out and make

1 those kind of hard decisions.

2 A. Of course, a jury of your peers.

3 Q. Very good. "Jury of your peers." You know,  
4 even as powerful as the district judges like Judge  
5 Galvan or the District Attorney Carlos Valdez, they  
6 can't make that decision. We trust the people, the  
7 jurors, to make that kind of decision. Do you agree  
8 with that system?

9 A. Yes, sir.

10 Q. People complain about our system, but it's  
11 still the best in the world, don't you think?

12 A. I agree.

13 Q. And it may not be perfect, but it's better  
14 than a lot of other ones, --

15 A. (Nods head.)

16 Q. -- right? And you understand that's a pretty  
17 awesome responsibility.

18 A. Oh, it definitely is.

19 Q. I mean, you're a young guy.

20 A. Yes, sir.

21 Q. You're going -- If you're on this jury,  
22 you're probably going to be one of the youngest people  
23 on the jury.

24 A. Okay.

25 Q. You feel like you can step up in those shoes

1 and fill those shoes and do it?

2 A. I don't -- I don't believe my age will really  
3 play that big a factor in it.

4 Q. Good answer, because you know what I was  
5 going to ask you next? Look at him. He seems kind of  
6 young himself, doesn't he?

7 A. Yes, sir.

8 Q. He's probably just a little older than you or  
9 maybe just a little older than you.

10 A. He looks it.

11 Q. Does that have any effect on you?

12 A. No.

13 Q. Would you agree with me that you should judge  
14 people by what they did and not what they look like or  
15 how old they are?

16 A. Of course, you can't judge people on what  
17 they look like.

18 Q. All right. And even age, because in Texas,  
19 they have a law that says you cannot seek the death  
20 penalty on people under 18 years of age. I mean, they  
21 could do the worst crime in the world and if they're  
22 16 years old, they can't get the death penalty. But  
23 the law also says over 18, you know, I guess they  
24 recognize that if you're over 18, you're old enough to  
25 know the difference between right or wrong, or you're

1 old enough to know what the law is, correct?

2 A. Of course, you are.

3 Q. Do you agree with that?

4 A. Yes, sir.

5 Q. I mean, you seem like a pretty mature guy for  
6 your age, and I wish I was that mature when I was 22.  
7 But the seriousness is, age may be some kind of factor  
8 you think about, but do you think that's really going  
9 to make the decision on what the outcome of the case  
10 is?

11 A. Not -- no, not age. Basically, because you  
12 have to hear everything in the case, you can't make a  
13 decision just based upon age

14 Q. Right. But as long you're over 18, I mean,  
15 -- I mean, obviously, I mean, the law says you can't,  
16 you know, give the death penalty to somebody under 18.

17 A. Of course.

18 Q. But do you agree that over 18 you should know  
19 what's going on and -- and face the consequences of  
20 your actions?

21 A. Yes, I believe once you're 18, you -- you  
22 definitely know the difference between right and  
23 wrong.

24 Q. Sure. Tell me about the death penalty. Now,  
25 that's one of the big issues, and we've hit on it a

1 little bit, but just tell me, in general, if somebody  
2 had come up to you, you know, before you got --  
3 because I know what happens is, you come in the jury  
4 room and then you start really thinking about it a  
5 lot. Had you thought about the death penalty before,  
6 and, if so, what were your feelings?

7 A. My feelings, I'm not really like -- of  
8 course, I'm not, like, overly for the death penalty,  
9 because I -- of course, nobody ever likes to see  
10 people die. But I'm not against it in any way. I'm  
11 -- if the case and the crime were to permit it, it  
12 would be one of the possible choices that you're going  
13 to have to make, but I'm not saying that every case  
14 warrants the death penalty.

15 Q. That's exactly what the law says. You said,  
16 "Every case doesn't warrant the death penalty." The  
17 law says the same thing, because in Texas there's only  
18 a few certain types of case you can even be eligible  
19 to get the death penalty. You know, if you kill a cop  
20 while they're on duty, or, you know, killing a kid  
21 under six years old, or killing more than one person  
22 at the same time, or if you kill them while you're  
23 raping them, kidnapping them, burglarizing them, or  
24 robbing them, those kind of cases, and there's a few  
25 more where they're eligible for the death penalty.

1 So you kind of agree with how the Texas  
2 Court set it up that way, the law sets it up, right?

3 A. Yes.

4 Q. I mean, if you forge a check or you steal  
5 something, that doesn't necessarily mean you're going  
6 to get the death penalty.

7 A. No.

8 Q. It's got to be a very serious crime.

9 A. Yes, sir.

10 Q. And it's not automatic by any means, right?

11 A. Oh, no. Definitely not.

12 Q. Sometimes people say, "Well, gosh, you know,  
13 we found him guilty of capital murder, he  
14 automatically gets the death penalty," and I have to  
15 say, "Wait a minute, there's two choices, death or  
16 life in prison, depending on what the evidence says."

17 A. Yes, sir.

18 Q. Have you ever read in the paper, like, maybe  
19 it will say something, or on the news it will say  
20 "This guy who was charged with burglary got 20 years  
21 in prison, and this guy who got charged with burglary  
22 got 5 years probation." Why -- why do you think that  
23 happens?

24 A. I guess there's different circumstances in  
25 every case, that no case is going to be alike. And



1 different jurors, they pick different -- different  
 2 sentencing. That's as far as I can tell.  
 3 Q. And that's an excellent answer. Different  
 4 circumstances call for different punishments. Maybe  
 5 one person, you know, the guy got 20 years had been in  
 6 prison before for burglary and it's his third time  
 7 he's been to prison for burglary. The second guy,  
 8 maybe he's a first-time offender, you know, he's never  
 9 even been arrested before and he gets probation, okay?  
 10 See what I'm saying?

11 A. Yes.

12 Q. You can't judge until you hear all the facts.

13 A. Of course not.

14 Q. And that's what the Judge was very careful in  
 15 going over with you. You can't prejudge things and  
 16 you have to wait. Because if you just say, two  
 17 burglars, and you think, well, why aren't they given  
 18 the same, well, there's probably a reason why they're  
 19 not given the same.

20 A. Yes, sir.

21 Q. And that's what -- the kind of decision  
 22 you're going to have make in this case. So you don't  
 23 think you'll have a problem participating in this type  
 24 of case?

25 A. No, sir.

1 Q. Even though it may be called upon -- it's an  
 2 awesome responsibility and it's something that -- that  
 3 certainly nobody wants to do or likes to do it, but if  
 4 it comes to it, I want to know if you can carry it  
 5 out?

6 A. Yes, sir.

7 Q. You see what I'm getting at? From my point  
 8 of view, I want to know if you don't just talk the  
 9 talk, but if you'll walk the walk.

10 A. Yes.

11 Q. You will see what I'm saying?

12 A. (Nods head.)

13 Q. Because it's okay because people sometimes  
 14 say, "Well, gosh, Mark, I believe in the death  
 15 penalty. It's a good law. I'm glad we have it in  
 16 Texas. We need to do something about crime." And  
 17 then I say, "Okay, well, come sit on the jury and make  
 18 that decision." They say, "Whoah, not me. Let  
 19 somebody else do it."

20 A. Of course.

21 Q. You know? You don't feel that way, though.

22 A. Well, it's a tough decision. We see a lot of  
 23 people -- I could see how a lot of people would be  
 24 afraid of having to make the decision.

25 Q. It's -- and it's okay. I'm not trying to

1 fight with those people.

2 A. Oh, yes, sir.

3 Q. I need -- from my point of view, I need  
 4 people that will carry it out if they think that.

5 A. Yes.

6 Q. Are you one of those people?

7 A. Yes, sir.

8 Q. Okay. The Defense is probably going to ask  
 9 you the opposite. They're probably going to say,  
 10 "Gosh, you know, if you listen to all the evidence,  
 11 does that mean you're always going to vote for a death  
 12 penalty? Can you consider a life sentence and give  
 13 them a life sentence, if that's what the evidence  
 14 calls for"?

15 A. Of course.

16 Q. And you can do that, too, can't you?

17 A. Of course.

18 Q. Of course. Well, you seem to be pretty  
 19 open-minded about that. Sounds like you're going to  
 20 wait until you hear everything.

21 Let's talk about why this is a capital  
 22 murder case. I -- I mentioned it a second ago about  
 23 it's murder plus something else, in this case, murder  
 24 plus robbery. And the law says if you kill somebody  
 25 or murder them while you're in the course of

1 committing or attempting to commit robbery, then it's  
 2 capital murder. You're eligible for the death  
 3 penalty. Doesn't mean you're automatically going to  
 4 get it, it just means that's one of the two options  
 5 that's available.

6 Robbery, I think the Judge will give you  
 7 some instructions at the end of the trial, will say  
 8 basically taking something by force or threats of  
 9 force. In other words, if you just take something  
 10 that's theft. But if you take something and hit  
 11 somebody over the head with something, you know, take  
 12 it or you say, "I'm going to hurt you if you don't  
 13 give me your wallet," that would be robbery. You  
 14 understand that?

15 A. Yes, sir, I do.

16 Q. The law does not say it has to be a  
 17 "Completed robbery." Now, that sounds funny, but if  
 18 you say, robbery -- well, here's an example. Say  
 19 you're a juror on a robbery case, and a guy goes into  
 20 a bank to rob a bank and he goes up to the teller and  
 21 sticks the gun in her face, says, "Give me all your  
 22 money." And the teller, of course, is scared of this  
 23 threat and gives him all the money. And he's going  
 24 out of the bank with the bag of money and the police  
 25 get called and they catch him right there at the bank.

1 He's never gets away with it. He's still got the  
 2 money. Can he come to court and say, "Hey, I'm not  
 3 guilty. I -- I didn't actually finish the robbery. I  
 4 didn't get away."  
 5 A. No.  
 6 Q. No. But -- that's silly, right?  
 7 A. Yes.  
 8 Q. It's kind of a trick question because people  
 9 will say, "Well, gosh, you know, I'm not guilty. I  
 10 didn't actually -- I didn't get away with the money.  
 11 I didn't actually get to take all the money." Or it  
 12 could be anything, he could be in the middle of  
 13 robbing the teller and, you know, the teller's handing  
 14 him the money and the police come in and stop him. He  
 15 goes, "I never got any of the money." Does that mean  
 16 it's not a robbery?  
 17 A. No. It's still a robbery.  
 18 Q. Of course not. Okay, it's kind of a tricky  
 19 legal thing, but it's not that trickery because it  
 20 makes sense. Just because a person goes in there and  
 21 holds a gun on somebody and says, "Give me all your  
 22 money," I mean, that's a robbery, right, when that  
 23 happens. It doesn't matter if he's actually finished  
 24 it or not. Do you agree with that, then?  
 25 A. Yes, sir.

1 Q. Do you agree with the fact that just because  
 2 a person is charged with a crime doesn't necessarily  
 3 mean they're guilty of the crime?  
 4 A. Of course not.  
 5 Q. Okay. What does that mean? That's what we  
 6 call "the presumption of innocence."  
 7 A. Uh-huh.  
 8 Q. As he sits right now -- there right now, do  
 9 you understand that he is presumed innocent?  
 10 A. Yes.  
 11 Q. He doesn't start with anything. He doesn't  
 12 have to prove anything. And, as the Judge said very  
 13 eloquently, the State has to prove the case beyond a  
 14 reasonable doubt. He has to prove nothing. He  
 15 doesn't even have to testify if he doesn't want to  
 16 because the Fifth Amendment guarantees that if he  
 17 doesn't testify we can't hold that against him.  
 18 You wouldn't hold it against him, would  
 19 you, if he doesn't testify?  
 20 A. No. That's -- that's an amendment, it's the  
 21 law. You can't --  
 22 Q. That's exactly right, it's the law. But some  
 23 people -- and, again, you know, I'm not trying to pick  
 24 on anybody, but some people say, "Look, Mark, I want  
 25 to hear both sides of the story, and I can't make a

1 decision unless I hear from him." And I have to tell  
 2 them, "Well, you're not going to qualify as a juror  
 3 because you have to follow the law that says if a  
 4 person exercises those rights, you can't hold it  
 5 against him." Would you be able to do that and not  
 6 hold it against him?  
 7 A. Yes, sir.  
 8 Q. And just because he's charged by indictment,  
 9 the grand jury has indicted him, does that mean he's  
 10 guilty?  
 11 A. No, not at all.  
 12 Q. Not at all. The other thing is the burden of  
 13 proof. In this case and every criminal case, it's  
 14 beyond a reasonable doubt. Do you watch much T.V.  
 15 about these crime shows or police shows or anything?  
 16 A. Yeah, I've seen them, seen them before, yes,  
 17 sir.  
 18 Q. Well, they're so entertaining, but they're so  
 19 inaccurate sometimes.  
 20 A. I can imagine how.  
 21 Q. I know there's this movie out there, it's an  
 22 old movie, it's called, "Shadow of a Doubt," "Beyond a  
 23 Shadow of a Doubt." And you had always hear that on  
 24 T.V., "Well, you got to prove it beyond a shadow of a  
 25 doubt." Guess what, this Judge is never going to tell

1 you you have to do it that way. The Judge is going to  
 2 say you have to prove it beyond a reasonable doubt.  
 3 It doesn't mean beyond all doubt, any doubt, shadow of  
 4 a doubt, anything like that. What it basically means  
 5 is you have to have -- be sure in such a way that  
 6 you -- that it's beyond a reasonable doubt. I just  
 7 don't want you holding the State to a burden that  
 8 would be unfair for me because there's no way I  
 9 could show it to you a hundred percent, right.  
 10 The only way I could prove to you a  
 11 hundred percent if you were a witness and you saw the  
 12 the whole thing yourself. That would be impossible  
 13 for me to do that --  
 14 A. Of course.  
 15 Q. -- because you wouldn't be on the jury. And  
 16 beyond a reasonable doubt doesn't mean that you have  
 17 to do that. All it just means is just beyond a  
 18 reasonable doubt, not beyond all doubt or any doubt,  
 19 because I've had some jurors come up and say, "Well,  
 20 Mark, you have to prove it to me 100 percent." I say,  
 21 "Well, it doesn't say a hundred percent. It says  
 22 beyond a reasonable doubt." Follow me on that?  
 23 A. Yes, sir.  
 24 Q. Okay. Let me talk about the -- the format  
 25 the trial goes. The Judge hit on this a little bit,



1 but I want to cover it with you. The first part of  
2 the trial, if you're selected on this jury, is guilt  
3 or innocence. The second part of the trial, if you  
4 get to that, is the punishment evidence, punishment  
5 part of the trial.

6 The first part of the trial is just  
7 basically did he do it or not, is he guilty or not of  
8 the crime? The State has to prove all the elements  
9 beyond a reasonable doubt, and if the State doesn't  
10 prove all of the elements, what does that mean?

11 A. If they don't prove all the elements, then  
12 he's I guess acquitted and innocent.

13 Q. That's right. Well, we call it actually "not  
14 guilty."

15 A. Not guilty.

16 Q. Not guilty because the State hadn't proven  
17 the case beyond a reasonable doubt. He doesn't have  
18 to prove he's innocent, but the -- the State has to  
19 prove that he's guilty. But that's a word,  
20 "Acquitted," is fine.

21 A. Okay.

22 Q. But if the State does prove the case beyond a  
23 reasonable doubt to the jury's satisfaction, what  
24 would your duty be?

25 A. To -- guilty?

1 Q. To find him guilty, right. So, if you find  
2 him guilty -- if you find him not guilty, the case is  
3 over with.

4 A. (Nods head.)

5 Q. But if you find him guilty, the jury does,  
6 then you go to the second part of the trial. And the  
7 second part of the trial you might get to hear  
8 additional evidence. Like, the first part of the  
9 trial is usually just what happened that day, you  
10 know, the surrounding circumstances of the crime,  
11 maybe before the crime, after the crime, but it's  
12 really about what happened that day, right?

13 A. Yes, sir.

14 Q. The second part of the trial, in order to  
15 help you decide what punishment he gets because,  
16 remember, it's not automatic --

17 A. Of course.

18 Q. -- you got to -- you might get to hear other  
19 stuff about his background. You might get to hear  
20 that the person has, you know, been an Eagle Scout and  
21 was on the honor roll in school. And then you might  
22 hear, well, no, he's been to prison ten times before.  
23 You see what I'm saying?

24 A. Yes.

25 Q. It's kind of like those burglary cases I told

1 you about where you don't know what the punishment's  
2 going to be till you know what the surrounding  
3 circumstances are. And so, you might get to hear this  
4 additional evidence, and then once you hear that part,  
5 does that mean you go back in the jury room and say,  
6 "Well, I vote for death or I vote for life"? No, it  
7 doesn't work that way. You don't just vote death or  
8 life. What you do is answer two questions. And it's  
9 how you answer those questions is what happens to the  
10 Defendant.

11 So, you've heard the evidence in the  
12 first part of the trial, you think he's guilty. The  
13 second part of the trial you get to hear additional  
14 evidence. You may get to hear additional evidence  
15 about his background, you know, good or bad. Then you  
16 go and answer two questions. They're on the board,  
17 here, and I'm going to ask you to turn around behind  
18 you and look at that first one.

19 The first one says, "Is there a  
20 probability that the Defendant would commit criminal  
21 acts of violence that would constitute a continuing  
22 threat to society?" We call that "the future  
23 dangerousness question." In other words, is he going  
24 to be a danger to us in the future, right? And you've  
25 probably heard words like "continuing threat to

1 society" before and that's kind of a catch phrase.

2 But I want you to highlight on a couple  
3 of words on there. The first question -- part of the  
4 question says, "Is there a probability." Probability  
5 means more likely than not. There's no way, unless  
6 you have a crystal ball and can look in the future,  
7 that you know for sure what's going to happen, right?

8 A. Of course.

9 Q. And the law doesn't require me to do that.  
10 The law just says is it probable, doesn't say for sure  
11 or certainty. The second part says, "that the  
12 Defendant would commit criminal acts of violence,"  
13 which could be almost any act of violence. It doesn't  
14 necessarily mean you think he's going to kill again  
15 because some people say, "Well, I can only give the  
16 death penalty if I think he's going to murder somebody  
17 again or commit capital murder again." But the law  
18 doesn't say it has to be that much. It just says  
19 would -- if you think he's going to commit criminal  
20 acts of violence, anything like that.

21 And the last part says, "would constitute  
22 a continuing threat to society." What does society  
23 mean to you?

24 A. Like, a community or basically anywhere.  
25 Anywhere that anyone would live, go.

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1 Q. Anywhere that there's other people, right?

2 A. Of course, yes.

3 Q. Okay. What if -- sometimes people come up to

4 me and say, "Well, Mark, why don't you just put him --

5 why do you seek the death penalty? Why don't you just

6 put him in prison? Because if you put him in prison,

7 they're locked up, they can't hurt anybody." And I

8 always say, "Wait a minute, who else is in a prison"?

9 A. They're all human beings. Doesn't matter if

10 they're in prison or not.

11 Q. That's right. There's other guards -- I

12 mean, there's guards --

13 A. Of course.

14 Q. -- there's prisoners, there's people that

15 work at the prison, like a warden and clerical people,

16 probably maintenance people, all those kind of folks.

17 So it's not like we put them on a desert island and

18 they're the only human being out there, right?

19 A. Of course not.

20 Q. Have you ever heard of that happening, like

21 guards getting attacked or inmates attacking other

22 inmates or stuff like that?

23 A. I seen shows where it happened before.

24 Q. Yes. Well, it happens not just on -- on T.V.

25 A. Oh, of course, I'm just saying --

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1 Q. It really happens, right?

2 A. Yes. I've never known of a case directly,

3 but...

4 Q. No, I know, but you -- you understand that

5 could happen, right?

6 A. Yes, sir, of course.

7 Q. So when people say, "Just putting him in

8 prison takes him away from society," that's not

9 exactly right.

10 A. No.

11 Q. It sounds kind of funny, but prison is

12 actually part of society because you're still

13 interacting with other human beings, right?

14 A. Uh-huh.

15 Q. Okay. So that's how that first question's

16 phrased. Is there a good chance, is it probable that

17 this Defendant might commit other criminal acts of

18 violence that would be a continuing threat to society?

19 Is there a chance he's going to be a danger in the

20 future?

21 A. (Nods head.)

22 Q. So you answer that question yes or no.

23 A. (Nods head.)

24 Q. Then you go to the next question. The second

25 issue says this -- and before I talk about the whole

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1 long explanation for it, let's talk about the word

2 "mitigating," because that's the mitigating

3 circumstance question. Mitigating basically means

4 anything -- this word "mitigating," means anything

5 that would lessen or make less severe the punishment.

6 In other words, he did the crime, but is there any

7 reason to give him a break and give him a life

8 sentence, instead of the death sentence. In other

9 words, you think he's guilty, you think he's a

10 continuing threat to society, but hold on, before you

11 give him the death penalty, is there any mitigating

12 circumstances or reasons to warrant that life, rather

13 than death be given?

14 Well, remember we were talking about not

15 automatic, right? You have to look at everything

16 else. Mitigating is kind of like the opposite of

17 aggravating factors. Remember that burglary example I

18 gave you earlier?

19 A. Uh-huh.

20 Q. Okay? And I said, "Well," you said "every

21 facts and circumstances are different"?

22 A. Yes.

23 Q. Say you had a burglar -- two burglary cases,

24 one burglar here, one burglary here. Two separate

25 cases and you're as a juror. But you hear, "Burglary,

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1 that's bad, just going into somebody's house and

2 stealing something without permission, and -- I don't

3 like burglars. I want to punish these guys both real

4 tough," and then you hear the facts and circumstances.

5 In the first burglary, a guy has kicked

6 in the back door, take -- broken the door off the

7 hinges, gone through the house, ransacked the house,

8 stolen money, jewelry, T.V., V.C.R., stereo, ransacked

9 the whole house, broke a bunch of stuff, tore up a

10 bunch of stuff, and then you find out in his past,

11 guess what, he's been to prison five times before for

12 burglary.

13 Now, look at the second guy. The second

14 guy is convicted of burglary, too, because he went in

15 somebody's house and stole something, but you hear the

16 circumstances of that and they're a little different.

17 What happened was, he didn't break in the house, the

18 door was unlocked in the back and he just went into

19 the kitchen. He went into the kitchen. He did not

20 steal money, jewelry, T.V., V.C.R. and stereo, he went

21 in there and stole some bread and some food to feed

22 his kids because he had lost his job and his kids were

23 hungry and needed some food. He could have stolen all

24 those other things, but he didn't. All he did was

25 take some food.

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1 And then you find out about his criminal  
2 history and he has none. He's never even been  
3 arrested before. Unlike this guy who had five prior  
4 burglaries, this guy has never even had a traffic  
5 ticket before. They're both equally guilty of  
6 burglary but would you really punish them the same  
7 way?

8 A. No.

9 Q. Why not?

10 A. Well, because of the -- it's totally  
11 different cases. That guy has been, you said, five  
12 times for burglary and ransacked the place. I think  
13 the other guy was trying to -- didn't have no money,  
14 you know, trying to get it for his kids, you know?  
15 That's --

16 Q. So --

17 A. -- completely different.

18 Q. So what you've done is done two things:  
19 You've looked at the crime itself and the  
20 circumstances of the crime, and you've looked at the  
21 guys' background, and you've come up with two  
22 different answers. In the first case, those are  
23 aggravating factors. Those are bad factors and  
24 probably make your sentence go high.

25 In the second case, the sentence would

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1 probably go lower because he didn't do anything as  
2 bad. That's what mitigating circumstance is all  
3 about, is there a reason to go lower than higher? And  
4 we all know that, you know, life is lower than -- than  
5 death, so the Judge tells you this: "You found him  
6 guilty of capital murder, you think he's a continuing  
7 threat to society, but wait a minute, jury, before you  
8 decide to give him the death penalty, stop, take into  
9 consideration all of the evidence, the circumstances  
10 of the offense," you know, what happened that day and  
11 the surrounding circumstances, "his character and his  
12 background," remember I told you, maybe he was an  
13 honor roll student or something, or maybe he's always  
14 been in trouble with the law, "and the personal moral  
15 culpability of the Defendant," is there sufficient  
16 mitigating circumstances or circumstances? Is there  
17 enough of these circumstances to warrant that a  
18 sentence of life, rather than the death sentence be  
19 imposed?

20 In other words, is there, like,  
21 extenuating or mitigating circumstances to say, "Look,  
22 you know, I'll give him a break"?

23 A. Uh-huh.

24 Q. What is a mitigating circumstance? I can't  
25 tell you. It's up to the jury to tell. Because some

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1 people will say, "Well, yeah, we should give him a  
2 break, because, you know, he was an honor roll student  
3 and he was an Eagle Scout." Some people may say, "I  
4 don't care if he's an Eagle Scout, you know, he still  
5 did this crime and he's got to pay the punishment."

6 In other words, the Judge is not going to  
7 say if you see any mitigating circumstances you  
8 automatically have to go lower, the Judge says is it  
9 enough, is there a sufficient mitigating circumstance?  
10 So you kind of have to balance them out and say,  
11 "Well, you know, he was a war hero, or maybe he was,  
12 you know, made straight A's in school or came from a  
13 broken home." And then other people may say, "Well,  
14 you know, he shot the guy 29 times, or, you know, he  
15 buried the body and kicked up the -- tore up the body  
16 afterwards, or he'd been to prison ten times before."  
17 You have to -- you have to balance all that stuff.

18 The only thing I can tell you is the  
19 Judge is going to tell you, you have to keep an open  
20 mind and consider the big picture before you give the  
21 death penalty. And it's kind of -- remember in school  
22 we always heard about checks and balances? It's kind  
23 of like a final check. Before you do it, is there any  
24 reason not to do it, is there any reason to give him a  
25 life sentence?

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1 So are you open-minded to that and  
2 consider, hey, if they bring up some evidence that  
3 says maybe he should get a life sentence, can you  
4 consider that, too?

5 A. Yes.

6 Q. And understand that just because they bring  
7 it up doesn't mean you automatically have to lower the  
8 sentence. Some people may say, "Look, I don't care if  
9 that happened, he still did this crime. It's still a  
10 bad crime. Based on all this other stuff and the big  
11 picture, I still think it outweighs those mitigating  
12 factors." Okay?

13 A. Okay.

14 Q. That's pretty much how that question works.  
15 Does that make sense to you?

16 A. Yes, it does.

17 Q. Yeah. It's kind of, you know, just to make  
18 sure everything is done right, you want to cover  
19 everything.

20 One thing the Judge may give you, too, is  
21 the law says that "Voluntary intoxication is not a  
22 defense to crime." Voluntary intoxication. That  
23 means if you get yourself drunk or high or stoned, or  
24 whatever, and you go commit a crime, that's not an  
25 excuse for the crime. I mean, I can't go get drunk,

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1 go rob a bank and say, "Well, I'm not guilty of  
 2 robbing the bank because I was drunk." No. As long  
 3 as it's voluntary intoxication, it's not a defense to  
 4 crime. Do you agree with that?  
 5 A. Of course, yes.  
 6 Q. Sure, that makes sense. And the law also  
 7 says, though, that it might be a -- it could be  
 8 considered a mitigating circumstance. Maybe you want  
 9 to give him a break because he was drunk or stoned,  
 10 maybe not. It's a possible mitigating circumstance.  
 11 That's what it is, it's just a possible mitigating  
 12 circumstance. A person's age can be a possible  
 13 mitigating circumstance, you know, his background  
 14 could be a mitigating circumstance. Almost anything  
 15 could be a mitigating circumstance. Doesn't mean it's  
 16 necessarily going to lower the sentence, it's got to  
 17 be enough of one to lower the sentence. You got that?  
 18 A. Yes, sir.  
 19 Q. Any questions about that?  
 20 A. No, sir.  
 21 Q. Do you think that scheme is pretty good to be  
 22 considered about doing these kind of cases?  
 23 A. I'm sorry?  
 24 Q. Do you think that scheme is a pretty good one  
 25 to be -- so you would be careful about, you know,

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1 doing these kind of cases?  
 2 A. Yes, sir.  
 3 Q. So you understand that you're going to listen  
 4 to everything before you make a decision, correct, on  
 5 the first part of the trial.  
 6 A. Yes, sir.  
 7 Q. And you understand that you not going to  
 8 automatically do anything, right?  
 9 A. No.  
 10 Q. And you understand those facts of law that  
 11 the Judge talked to you about, the parts of the law  
 12 about, you know, indictment, you can't charge -- just  
 13 because he's charged doesn't mean he's necessarily  
 14 guilty, right?  
 15 A. Yes, sir.  
 16 Q. In fact, you even put, "Not all cases warrant  
 17 the death penalty." That gives me the impression you  
 18 say, "Hey, I can understand the death penalty in  
 19 certain cases, but not in all cases."  
 20 A. Of course.  
 21 Q. It's up to the facts.  
 22 A. Every case is different.  
 23 Q. Now, the law also says that policemen are  
 24 treated the same just like other people. Sometimes  
 25 people say, "Well, you know, he's a policeman. I have

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1 to automatically believe what he says." And I always  
 2 tell them, "Well, look, a policeman's supposed to be  
 3 given the same weight as anybody else."  
 4 A. Yes.  
 5 Q. If a policeman comes up in uniform and he  
 6 says, you know, the moon is made of green cheese, that  
 7 doesn't mean that you have to automatically believe  
 8 them, right?  
 9 A. No, of course not.  
 10 Q. Would you agree with me, though, that  
 11 policemen should be treated just like everybody else?  
 12 A. Yes.  
 13 Q. I see you're still going to school, right?  
 14 Are you taking further schooling?  
 15 A. No, I've already graduated.  
 16 Q. Oh, you've already graduated from this  
 17 course.  
 18 A. Yes, sir.  
 19 Q. I'm sorry, I've got you mixed up with  
 20 somebody else. And you work on helicopters?  
 21 A. Yes, I build helicopters for Black Hawk and  
 22 Appaches.  
 23 Q. Okay. Do you-all just repair them or do  
 24 you-all actually build them?  
 25 A. We build them. Oh, well, we -- they come

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1 back from Iraq and we tear them down, then rebuild  
 2 them with new parts. Overhaul.  
 3 Q. Okay. So it's kind of like rebuilding them  
 4 from scratch, overhauling them.  
 5 A. Yes, sir.  
 6 Q. And you work on the engine part?  
 7 A. Yes, sir.  
 8 Q. What made you go into that field?  
 9 A. My dad worked out on the Base and they had a  
 10 program when when I was in high school to where I  
 11 could earn college credits while I was in high school.  
 12 And while I was in college, I was getting paid to go  
 13 to college. And I knew it was a good career, of  
 14 course, because my dad was out there, so I decided to  
 15 do it.  
 16 Q. Did your dad work out there for a long time?  
 17 A. He's been out there for about 20 years.  
 18 Q. It seems like everybody I know that works at  
 19 CCAD has been there 20, 30 years. So it's good for a  
 20 a young fellow like you to get a good job like that  
 21 early in your career.  
 22 A. Yes, sir.  
 23 Q. Do you have any questions about anything  
 24 we've talked about that maybe I didn't explain  
 25 something very well?



1 A. No, not at this time.

2 MR. SKURKA: Okay. It was nice talking

3 to you. I appreciate you listening to me and

4 answering all my questions. I'm going to let the

5 other lawyers talk to you now.

6 VENIREPERSON NO. 38: Okay.

7 MR. SKURKA: Thank you, sir.

8 THE COURT: All right.

9 MR. GARZA: May I proceed, Your Honor?

10 THE COURT: Mr. Garza.

11 MR. GARZA: Thank you.

12 VOIR DIRE EXAMINATION

13 BY MR. GARZA:

14 Q. Good morning, Mr. Johnston.

15 A. Good morning, how are you?

16 Q. My name is Ed Garza, as I had previously

17 introduced myself back I think on the 3rd when we

18 filled out these questionnaires. And sitting next to

19 me is my Co-Counsel, Mr. Jones, --

20 A. Hello.

21 Q. -- and, of course, our client, --

22 A. Hello.

23 Q. -- John Henry Ramirez. Is there any reason,

24 sir, in your mind, that you couldn't be fair and

25 impartial to both sides in this case?

1 A. No.

2 Q. Okay. The reason we talk to you about all

3 these concepts, you know, the guilt-innocence phase,

4 the punishment phase, these special issues and all

5 those things is because this is going to be the only

6 time we really get to talk to you.

7 A. Oh.

8 Q. Okay?

9 A. Yes, sir.

10 Q. This is the only time we get to talk to you,

11 okay?

12 A. Okay.

13 Q. One-on-one, that is --

14 A. Yes, sir.

15 Q. -- and -- and, incidentally, too, I want to

16 remind you that, as -- as a juror, if you get picked

17 in this case, you're going to be referred to sometimes

18 as the trier of the facts, okay? You're going to have

19 to decide factual issues in this case because the

20 Judge, essentially, decides all the legal issues,

21 okay?

22 A. Yes.

23 Q. Because he is a trained attorney and he's an

24 elected judge and he is the one that gets to decide

25 those matters, okay?

1 A. Okay.

2 Q. We, the lawyers, will talk about certain

3 legal issues to you and things of that nature. We get

4 to make an opening statement, you know, perhaps at the

5 beginning of the trial before you hear any testimony,

6 and then after you hear the testimony we get to also

7 do what are called "final arguments," okay? But,

8 under the law in Texas, whatever we say to you is not

9 evidence, okay? Whatever we say to you, okay.

10 The only evidence you'll be allowed to

11 consider will be what you hear from that witness stand

12 because it will be under oath.

13 A. Okay.

14 Q. See the difference?

15 A. Oh, okay, yes.

16 Q. Okay? So what I'm talking to you about today

17 here, or Mr. Jones or Mr. Skurka, you know, is not

18 evidence of anything, okay?

19 A. Okay.

20 Q. And, basically, when we argue the case to

21 you, we are just trying to kind of give you a synopsis

22 or a -- what we believe to be -- is going to be a road

23 map of the case, you know, what the evidence will

24 hopefully show or not show. And then in final

25 argument, we're going to dissect the evidence you've

1 already heard and -- and argue and advocate for our

2 client on our part of the case, and, of course, the

3 State will do the same thing, okay?

4 A. Okay.

5 Q. But whatever we say to you, since we're not

6 under oath, and even though we are officers of the

7 court is not evidence for to you consider, okay?

8 A. Okay.

9 Q. We're just sort of arguing things to you at

10 those phases of the trial to see if there's any

11 last-minute convincing we can possibly do, and that's

12 all.

13 A. Okay.

14 Q. You understand the reasoning on that?

15 A. Yes, sir.

16 Q. Does it make sense?

17 A. Yes, sir.

18 Q. So, essentially, the only matters that you

19 will be called upon to decide are what you hear right

20 there from that witness stand, okay?

21 A. Okay.

22 Q. And you'll have to use your common sense to

23 decide if that person testifying is telling you the

24 truth, part of the truth or none of the truth based on

25 what they're saying and what their background might

1 be, any motivation or anything like that, okay?

2 A. Okay.

3 Q. So, it's important, and we always ask

4 perspective jurors not to leave their common sense in

5 the parking lot.

6 A. Oh, no, you can't.

7 Q. Okay? Can you do that for us?

8 A. Yes, sir, I will.

9 Q. I think you can, too. I just want to discuss

10 with you what I think you already know pretty well, is

11 that the State of Texas has to prove this case to you

12 beyond a reasonable doubt, okay?

13 A. Yes.

14 Q. Reasonable doubt is not something that is

15 naturally defined or anything, or whatever, but we can

16 sort of kind of give you some examples of it. And,

17 you know, one of the ones that we've been using is

18 when you generally say you're going to take a trip for

19 vacation, or something, you're going to get on a

20 plane, at that point, if you have bought your tickets

21 through a reasonable airline, whatever, you have good

22 reason to believe that you should be able to get to

23 your destination.

24 A. Yes, sir.

25 Q. Is that correct?

1 A. Yes, sir.

2 Q. Okay. But let me sort of change the facts a

3 little bit so we can get to the issue of reasonable

4 doubt. Say you're sitting in the cocktail lounge

5 waiting for your flight to be called and you see this

6 guy walk up in a uniform who looks somewhat like a

7 pilot and he's carrying one of those bags behind him.

8 Have you ever seen those guys at the airport when they

9 show up, the pilots?

10 A. I have not but I can imagine.

11 Q. Okay. Then let's just pretend that, you

12 know, he's a guy in uniform, and stuff, and whatever,

13 and then all of a sudden he sits at the bar and starts

14 throwing back about six or seven, eight martinis, huh?

15 A. Oh...

16 Q. Huh? And you're going, "Gee, I sure hope

17 that's not the guy I'm going to fly with, you know"?

18 A. Yes, sir.

19 Q. And you see him leave the cocktail lounge,

20 and then you go up the jet lane and whatever, and sure

21 enough, you get up to your plane and he's the guy

22 that's greeting you at the door. Are you going to

23 have a little bit of doubt about getting on that

24 airplane?

25 A. Yes, definitely, I would.

1 Q. That's what we're talking about.

2 A. Okay.

3 Q. Okay?

4 A. Okay.

5 Q. You see the difference?

6 A. Yeah, definitely.

7 Q. All right. Now, you know like

8 what Mr. Skurka and the Judge have aptly described to

9 you as there's two parts to every criminal trial in

10 Texas, there's the guilt-innocence first and then the

11 punishment, if we have to get there. If you don't

12 feel that the State of Texas has met their burden, and

13 if they don't, are you going to feel bad about

14 acquitting our client?

15 A. I'm sorry?

16 Q. If for some reason in this trial the State of

17 Texas doesn't prove their case, are you going to --

18 are you going to feel bad about acquitting our client?

19 A. No, not at all.

20 Q. All right. And then, of course, after that,

21 if it does happen that they do prove their case to you

22 beyond a reasonable doubt, we get to the punishment

23 phase and then we get to discuss with you, and it

24 becomes a whole new trial where the State still has

25 the burden of proving to you beyond a reasonable doubt

1 through reasonable and competent evidence that, one,

2 there could be a probability that the Defendant would

3 commit criminal acts of violence that would constitute

4 a continuing threat to society, okay?

5 A. Okay.

6 Q. Have you given any thought to what you would

7 want to hear or would need to hear to convince you of

8 our client's capacity to be a continuing threat to

9 society?

10 A. No, I haven't really thought about it too

11 much. I haven't -- I really don't know anything about

12 this case or -- basically, I'd have to hear, like, I

13 guess just like everything, you know? You have to

14 take everything in and then make your decision.

15 Q. Would you want to hear about his background?

16 A. Of course.

17 Q. Would you want to know if he's ever been in

18 trouble before?

19 A. Well, yes.

20 Q. If he has any sort of criminal history?

21 A. Of course.

22 Q. Okay. Or if he's, conversely, never been in

23 trouble before?

24 A. Of course, yes, I would want to hear about

25 his past.



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1 Q. Okay. Now, this Special Issue No. 2, I want  
2 to just kind of discuss a little bit about it and I  
3 want to ask you some questions about your  
4 understanding of these issues. And I don't mean to  
5 embarrass you or anything because there's a lot of  
6 words out there that basically are like legal words.  
7 They're --

8 A. Uh-huh.

9 Q. -- you know, these words up there come from  
10 a very -- a very prolific Supreme Court case, okay,  
11 that was decided a long time ago, okay, by the Supreme  
12 Court. And Mr. Jones and I have been lawyers for,  
13 combined, maybe about 70 years, and it's still  
14 difficult for us to figure out what some of those  
15 people up there on the Supremes are telling us, okay?  
16 We call them "the Supremes."

17 But to you, in your mind, can you tell me  
18 what a Defendant's character and background would mean  
19 to you?

20 A. Well, it -- like his character and  
21 background. It would, basically, I guess, tell me  
22 just -- I can't think of the words to put it. His  
23 background would tell me, like, where he came from and  
24 how -- how his background would influence his choices  
25 and --

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1 Q. Absolutely. What about his character?

2 A. Well, I really can't say because I -- I'd  
3 have -- like, each character is different, you know?  
4 Each person has a different character. Like, it's  
5 kind of hard just to, like, generalize it, you know?

6 Q. Is -- is there anything that immediately  
7 grabs your mind about what "character" means?

8 A. What character means, like -- like, how you  
9 are and how you -- how you -- I guess, how you're  
10 presumed by other people and how you --

11 Q. How you're viewed by other people.

12 A. Yes.

13 Q. How other people regard you.

14 A. Yes.

15 Q. Isn't that true?

16 A. Yes.

17 Q. Okay. Exactly what it means. Can you -- can  
18 -- before you make up your mind one way or the other,  
19 would you be able to sit down and listen to any  
20 evidence concerning potentially our client's character  
21 and background before you decide his fate?

22 A. Yes.

23 Q. Could you do that?

24 A. Oh, yes, I could.

25 Q. You see, that's what that special issue's all

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1 about because, see, if the trial goes a certain way,  
2 and we don't know, --

3 A. Of course.

4 Q. -- where he gets found guilty, let's just  
5 say, and you say yes to that special issue, well, it's  
6 like a train rolling down the track, you know, at that  
7 point maybe without any brakes, --

8 A. Okay.

9 Q. -- okay? And then we're asking you, well,  
10 you know, before we either, you know, end up in a dry  
11 gulch, or wherever, with that train, can you consider  
12 these issues in possibly saying that, "Well, even  
13 though he did this and even though we think he's a  
14 threat to society, we think that there's some  
15 sufficient mitigating circumstances having to do with  
16 his character, his background and his personal moral  
17 culpability that would convince us that he does not  
18 deserve the death penalty."

19 A. Yes, sir, because it's -- I guess, I look at  
20 it like two different stages because that's the facts  
21 that they present and then that one's about his  
22 background and character, of course, so it's pretty  
23 much you have to make two different decisions on  
24 whether he's guilty. And then, of course, the  
25 mitigating or, I guess, circumstance.

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1 Q. Okay. And you understand that the mitigating  
2 is kind of a -- it's not a word that we generally --  
3 or, you know, --

4 A. Yeah.

5 Q. -- the general deals with on a daily basis.  
6 We do, as lawyers, you know, --

7 A. Yes.

8 Q. -- all day long, but, even then, you know,  
9 until this case came out several years ago, we still  
10 had to grapple with the idea, well, what -- what does  
11 it really mean, what does it mean, you know, and how  
12 do we explain it to people and juries in these types  
13 of cases, you know, and will they understand expert  
14 testimony on this matters and things of that nature?  
15 And we need to be sure that -- that these things like  
16 character, background, personal moral culpability are  
17 things that you can give some effect to, okay.

18 But once again, it's up to you how you  
19 want and what effect you want to give it, --

20 A. Yes.

21 Q. -- you know, good or bad, good or bad, okay,

22 --

23 A. (Nods head.)

24 Q. -- in making your decision. Can you do that?

25 A. Yes, sir.

1 Q. Okay. And we realize and understand that  
 2 it's a serious responsibility.  
 3 A. Yes, a very --  
 4 Q. And it's one --  
 5 A. -- very much so, yes, sir.  
 6 Q. -- that we all have here, too.  
 7 A. I'm sorry?  
 8 Q. It's one that we all share.  
 9 A. Yes.  
 10 Q. Okay? And it's important that we try to get  
 11 it right.  
 12 A. Yes.  
 13 Q. Do you agree with that?  
 14 A. Oh, definitely.  
 15 MR. GARZA: Thank you, sir. I don't  
 16 think I have any other questions for you.  
 17 THE COURT: All right.  
 18 MR. SKURKA: Judge, I have just one quick  
 19 follow-up --  
 20 THE COURT: Okay.  
 21 MR. SKURKA: -- if I might.  
 22 THE COURT: Okay. Okay.  
 23 VOIR DIRE EXAMINATION  
 24 BY MR. SKURKA:  
 25 Q. On one of the questionnaire questions it

1 says, "The law in Texas says a person convicted of  
 2 capital murder may receive the death penalty solely  
 3 because of the facts and circumstances of the crime,  
 4 even if the person has committed no other previous  
 5 crimes. Do you agree with this law?" You put, "Yes."  
 6 A. I'm sorry?  
 7 Q. Okay. Let me read it, again.  
 8 A. Okay.  
 9 Q. One of the question in the questionnaire  
 10 said, "The law in Texas says that a person convicted  
 11 of capital murder may receive the death penalty solely  
 12 because of the facts and circumstances of the crime,  
 13 even if the person has committed no other previous  
 14 crimes. Do you agree with this law? Yes or no?" And  
 15 you put, "Yes."  
 16 A. Well --  
 17 Q. And that's fine to say that because the law  
 18 says -- remember, I was giving you those examples of  
 19 person being convicted five times before and a person  
 20 who's never been to prison before? You do not have to  
 21 only give the death penalty if the person has been  
 22 convicted before.  
 23 A. Correct.  
 24 Q. It can be just on the facts and circumstances  
 25 of that case. You understand that?

1 A. Yes.  
 2 Q. It's kind of a wordy question but there's an  
 3 example that we used to use in Houston years ago on  
 4 Halloween night. This man had taken an insurance  
 5 policy out on his kid and he fed his own kid poison  
 6 Halloween candy and killed him. That kid was -- that  
 7 guy was like a good member of the community. Nobody  
 8 ever -- he had never had a traffic ticket, never got  
 9 in trouble before, but after that, they called him  
 10 "The Candy Man." And he was given the death sentence  
 11 or life sentence, the highest sentence he could get,  
 12 even though he was a first-time offender, he had no  
 13 priors.  
 14 You understand because of the  
 15 circumstances of that case the jury could decide to  
 16 give him the maximum sentence even though he hadn't  
 17 been to prison before because of the circumstance of  
 18 the case?  
 19 A. Yes.  
 20 Q. That's all I wanted to remind you, you don't  
 21 have to have a person that's been to prison ten times  
 22 before. It could be any of the surrounding  
 23 circumstances. Remember that question said look at  
 24 all of the evidence, including the case itself.  
 25 A. Yes.

1 Q. Can you do that?  
 2 A. Yes, I will.  
 3 MR. SKURKA: Okay, thank you. That's all  
 4 I have, Judge.  
 5 THE COURT: All right.  
 6 MR. GARZA: No more questions.  
 7 THE COURT: Why don't you wait in the  
 8 jury room, Mr. Johnston, for just a second. I'm going  
 9 to discuss with the lawyers.  
 10 VENIREPERSON NO. 38: Okay.  
 11 (Venireperson exits courtroom.)  
 12 MR. SKURKA: Judge, on the record,  
 13 State will accept this juror.  
 14 MR. GARZA: We will, also.  
 15 THE COURT: All right. This Juror No. 5.  
 16 Let's bring him in.  
 17 (Venireperson enters courtroom.)  
 18 THE COURT: All right, Mr. Johnston,  
 19 you are on the jury, okay?  
 20 VENIREPERSON NO. 38: Okay.  
 21 THE COURT: Now, here's the deal, I think  
 22 I've already told you, and -- and I don't want you  
 23 watching the local news or reading the local paper,  
 24 okay? I just want you to get the facts on this case  
 25 from courtroom, okay, what comes through that witness

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1 chair and the exhibits that are admitted into  
 2 evidence, all right?  
 3 VENIREPERSON NO. 38: Yes, sir.  
 4 THE COURT: I don't want you talking to  
 5 anybody about this case.  
 6 VENIREPERSON NO. 38: Okay.  
 7 THE COURT: Somebody tries say, "No, no.  
 8 Can't talk to you. Judge told me I can't talk about  
 9 the facts of the case at all until the case is over  
 10 with," okay?  
 11 VENIREPERSON NO. 38: Yes, sir.  
 12 THE COURT: Now, I expect we're going to  
 13 start this trial on December the 1st. It may -- it  
 14 will take that week for sure. It may spill into the  
 15 next week, so you might want to let your employer  
 16 know.  
 17 VENIREPERSON NO. 38: Okay.  
 18 THE COURT: And I think it will take  
 19 those two weeks, all right?  
 20 VENIREPERSON NO. 38: Okay.  
 21 THE COURT: All right. Thank you very  
 22 much for coming down and we'll be keeping in touch.  
 23 We'll let you know if things change.  
 24 VENIREPERSON NO. 38: Okay. So you --  
 25 THE COURT: We'll call you and let you

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1 know when to come down here, but I'm just telling you  
 2 that's tentatively what it's looking like, okay?  
 3 VENIREPERSON NO. 38: Okay.  
 4 THE COURT: Okay. Thank you very much.  
 5 VENIREPERSON NO. 38: Thank you.  
 6 THE COURT: If you need work excuse,  
 7 bailiff can get it for you.  
 8 VENIREPERSON NO. 38: All right. Thank  
 9 you.  
 10 (Venireperson exits courtroom.)  
 11 THE COURT: All right. Let's take a  
 12 little break, gentlemen.  
 13 (Short recess.)  
 14 MR. SKURKA: I think we have an  
 15 agreement.  
 16 THE COURT: On who?  
 17 MR. GARZA: On Juror 41, Judge, we're  
 18 going to go ahead and mutually agree to excuse him.  
 19 MR. SKURKA: That's correct, Judge. The  
 20 State agrees to excuse No. 41, also.  
 21 THE COURT: Okay.  
 22 MR. GARZA: I -- you know, we can see  
 23 that there's probably some occupational bias on that  
 24 matter.  
 25 THE COURT: Okay. Well, I wonder if he's

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1 here. We'll ask Frank.  
 2 MR. SKURKA: Did we put 39 on the record?  
 3 THE COURT: All right. Let's go off the  
 4 record.  
 5 (Off-the-record discussion.)  
 6 THE COURT: All right. So we agreed on  
 7 Gerald Rogen, correct?  
 8 MR. SKURKA: Yes, Your Honor.  
 9 THE COURT: All right, Gerald Rogen is  
 10 gone by agreement.  
 11 MR. JONES: What was his number?  
 12 THE COURT: His number was 41. You  
 13 missed the story about the -- being chased at the  
 14 Republican --  
 15 MR. SKURKA: That was a pretty good  
 16 story.  
 17 THE COURT: Okay. Then, I guess, the  
 18 next person is Reid Baucom?  
 19 MR. SKURKA: 44?  
 20 MR. GARZA: Yes.  
 21 THE COURT: Are they here? Bring him in.  
 22 THE BAILIFF: Okay.  
 23 (Venireperson enters courtroom.)  
 24 THE COURT: You are Mr. Baucom?  
 25 VENIREPERSON NO. 44: Yes, sir.

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1 VENIREPERSON NO. 44,  
 2 REID BROWNING BAUCOM,  
 3 VOIR DIRE EXAMINATION  
 4 BY THE COURT:  
 5 Q. All right, Mr. Baucom, we're going to talk to  
 6 you about some things. Obviously, we're looking to  
 7 pick a jury, okay, and you know that. We need to talk  
 8 to you about two things. We're looking for people  
 9 that can keep an open mind, okay, and people that can  
 10 follow the law, okay.  
 11 So let's begin with keep an open mind.  
 12 Let me get to your questionnaire here. Do you think  
 13 that you can keep an open mind in this case?  
 14 A. I think so.  
 15 Q. Okay. Because some people say, "Well, you  
 16 know, I just can't, or maybe I've seen something in  
 17 the news and I'm already leaning one way or the other  
 18 because of that," or for whatever reason. We just  
 19 want to make sure that you can keep an open mind. And  
 20 if you can't it's okay, but we do need to know.  
 21 A. Right. I think I can.  
 22 Q. Okay. Okay. All right, next thing. This is  
 23 a criminal case, obviously. Let's see here. You have  
 24 never been on a criminal jury before.  
 25 A. No, sir.

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1 Q. Okay. Well, we want to talk to you a little  
2 bit about the law in criminal cases. Some of it you  
3 probably already know. But, in any event, in every  
4 criminal case in the State of Texas, the burden is on  
5 the State of Texas to prove the charges, okay? They  
6 bring the charges, but the law says, "That's fine if  
7 you bring the charges, but you got to -- you bring  
8 them, you got to prove them." And the State just  
9 doesn't get to say that person's guilty and then it's  
10 so. They got to prove them to -- to the people, to  
11 the jury, okay? You got any problem with that?

12 A. No, sir, I don't.

13 Q. Okay. You can follow that law. Okay, then  
14 the next thing is the burden of proof is beyond a  
15 reasonable doubt. You've probably heard that before,  
16 beyond a reasonable doubt. And that's their burden,  
17 okay, it's on the State. And it's the highest burden  
18 that we have in the law, but it -- it's not defined.

19 What it isn't, it's not beyond all doubt  
20 or beyond a shadow of a doubt. It's what it is,  
21 beyond a reasonable doubt. And the lawyers will  
22 probably give you some examples of what they -- to  
23 illustrate what they think it means, okay? Could you  
24 hold the State to that burden?

25 A. Yes, sir.

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1 Q. Okay. Now, as part of the fact that the  
2 State's got the burden of proof, the law says if the  
3 State's got the burden of proof, well, then, everyone  
4 is presumed to be innocent until they can prove  
5 otherwise, okay? In other words, we presume everyone  
6 to be innocent until evidence is brought that can  
7 change that presumption. You follow me?

8 A. Yes, sir.

9 Q. Okay. And in this case the Defendant here,  
10 Mr. Ramirez here, is presumed by law to be innocent,  
11 unless and until if they can prove otherwise. You  
12 follow me?

13 A. Yes, sir.

14 Q. Is that -- you could follow that?

15 A. Yes, sir.

16 Q. And presume him to be innocent?

17 A. Yes, sir.

18 Q. Okay. Now, also as part of all that, since  
19 the State has the burden of proof, the Defense doesn't  
20 have to do anything, they don't have to present  
21 evidence. Now, some people say, "Well, you know what,  
22 I like to hear both sides of the story, and -- before  
23 I can make a decision." Well, it doesn't really work  
24 like that, okay? It doesn't work like that because  
25 they've got the burden of proof. It's doesn't -- it's

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1 not even, okay? They've got a burden and they have to  
2 prove it. And, as such, they don't have -- the burden  
3 never shifts over here. They don't have to present  
4 evidence.

5 As part of that, Defendant doesn't have  
6 to testify under the law. Now, it's -- it's beyond  
7 just the law, it's in the Constitution. Defendant  
8 doesn't (sic) have a right to testify, and -- and it's  
9 all -- you know, because they don't have burden of  
10 proof.

11 Now, I -- I submit there's lots of  
12 reasons why a person may not want to testify. Maybe  
13 his lawyers advise him not to testify because they  
14 don't think they've proven their case, okay? Maybe --  
15 maybe the Defendant gets very stressed and just  
16 can't -- he stutters when he gets on the stand. I  
17 mean, there's a lot of reasons, okay? But the bottom  
18 line, Mr. Baucom, is that I need to know from you  
19 whether you can follow that law or whether you would  
20 hold it against him if he -- if he didn't testify.  
21 Either way is okay, but we need to know.

22 A. Yeah, I can understand why he wouldn't want  
23 to testify. I don't think I could do it, either. I  
24 understand that. That's reasonable.

25 Q. Okay. But would you follow that law and

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1 not -- see, it's -- it's not that -- that they can't  
2 make him testify, it's more than that. If you're  
3 selected on the jury, you can't go back in the jury  
4 room and go, "Okay, let's see, this is what the State  
5 presented. Defense didn't present anything, so I'm  
6 going to give State more points because he didn't  
7 testify. He didn't tell me his side of the story,  
8 therefore, that hurts him. I'm going to put some more  
9 over here on the State's side." You can't do that.  
10 And, if you would do that, that's okay, but we need to  
11 know that, okay?

12 A. Yes.

13 Q. Because that's really not -- that's not  
14 really following the law. I need to know from you  
15 whether you would hold it against him or you could  
16 follow the law and not hold that against him.

17 A. I believe I could follow the law there.

18 Q. Okay. You wouldn't hold it against him?

19 A. No. I can understand that.

20 Q. Okay. All right. Now, let's talk about the  
21 charge then. The charge is capital murder. And, as  
22 we've been going through this process, I -- and I've  
23 been explaining to the different potential jurors  
24 about the situation, I talk about "plain murder." And  
25 I hate that term but I haven't come up with a better



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1 one, all right? "Plain murder." What's plain murder?  
 2 Well, it's the intentional taking of another person's  
 3 life. That's plain murder, all right? It's not  
 4 called "plain murder," we just -- I'm saying that to  
 5 differentiate it from capital murder.

6 The legislature says that there are  
 7 certain types of murders that are capital, that is,  
 8 the death penalty is a possibility. Just taking  
 9 someone's life is not necessarily a capital murder,  
 10 okay? Some people think that. "You take a life,  
 11 well, then maybe the State could take yours," but it's  
 12 not like that.

13 Capital murder is murder plus, okay,  
 14 murder plus something else, plus a special  
 15 circumstance. And there's a laundry list that the --  
 16 that the legislature has given us. In this case,  
 17 what -- what the State has alleged is that this  
 18 Defendant committed a murder while in the course of or  
 19 attempting to commit a robbery, same time, okay? So  
 20 they got -- they put -- I mean, two serious crimes  
 21 together and the two serious crimes together make the  
 22 capital murder. You follow me?

23 A. Yes, sir.

24 Q. Okay. So, we got robbery, and of which, of  
 25 course, is the forcible taking of something from

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1 another. Not just theft, robbery. Okay? You  
 2 forcibly take or threaten to take something from  
 3 another, and they put the two together.

4 Now, that gives us capital murder.  
 5 And -- and the law says that for someone who's found  
 6 guilty of capital murder, the State has to prove all  
 7 of the elements. That is, they have to prove the  
 8 robbery and the murder, all of it. And they don't get  
 9 to prove seven out of eight or eight out of nine,  
 10 whatever the number of elements there are. They have  
 11 to prove it all.

12 Would you hold the State to that burden  
 13 and require them to prove all of the elements before  
 14 you found the Defendant guilty of capital murder?

15 A. Yes, sir.

16 Q. Okay. Now -- okay. Now, you've never been  
 17 on a criminal jury before but let me explain to you  
 18 how it works. A lot of this stuff that we just talked  
 19 about, you know, a lot of jurors know that because  
 20 they've read it or maybe they remember it from school  
 21 or maybe they even saw it on T.V., or whatever. One  
 22 thing that a lot of jurors don't know is that our  
 23 system in -- in Texas, the jury system, is bifurcated.

24 And what does that mean? Well, that  
 25 means you got a first part of the trial, which is the

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1 guilt or innocence phase. In other words, the  
 2 beginning of the trial would go some like this, the  
 3 State would try to prove to you as the jury their case  
 4 beyond a reasonable doubt through evidence, okay? And  
 5 the Defense, they might present evidence, they might  
 6 not. They might just -- they might just use -- choose  
 7 to cross-examine the State's witnesses and test their  
 8 evidence that way, okay.

9 Then you'll hear closing arguments. I'll  
 10 read to you the Charge, which is a packet of law that  
 11 you get. Sort of -- sort of like an instruction  
 12 manual for the jury and you get to go back there and  
 13 deliberate, okay? You follow me?

14 A. Uh-huh.

15 Q. Then you determine whether the State's proven  
 16 their case beyond a reasonable doubt, guilty, not  
 17 guilty. If the jury comes back not guilty, the case  
 18 is over with, okay?

19 A. (Nods head.)

20 Q. If the jury finds the Defendant guilty of  
 21 capital murder, we go on to the second phase of the  
 22 trial, which is the punishment phase. Now, normally  
 23 in criminal cases, other than a capital murder, there  
 24 is a punishment range, okay? Let's say, 5 years to 99  
 25 years or life, okay? And then the jury would go back

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1 there on the punishment part and they'd say, "Well,  
 2 you know, based upon all the facts and circumstances,  
 3 we think it's X," you know, they decide. You don't do  
 4 that in a capital murder case, all right?

5 I will tell you, there's two  
 6 possibilities in punishment if a Defendant is found  
 7 guilty of capital murder. And, of course, we've  
 8 talked about one, that's death, death penalty. The  
 9 other is life in prison. There's two possibilities.  
 10 But you don't say life or death, that's not what the  
 11 jury does. The jury answers questions, okay, and then  
 12 based upon the answers to those questions determine  
 13 what the sentence is.

14 And if you'll look over here, over your  
 15 shoulder here, here's the first question, "Is there a  
 16 probability the Defendant would commit criminal acts  
 17 of violence that would constitute a continuing threat  
 18 to society?" That's Question 1, and the jury would  
 19 answer yes or no, okay?

20 After they answer that question, then  
 21 they would -- if you turn around in your right  
 22 shoulder there is Special Issue No. 2, the second  
 23 question. "After taking into consideration all of the  
 24 evidence, including the circumstances of the offense,"  
 25 that's the first part of the trial, the guilt or

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1 innocence part, okay, "the Defendant's character and  
2 background and the personal moral culpability of the  
3 Defendant, is there a sufficient mitigating  
4 circumstance or circumstances to warrant a sentence of  
5 life imprisonment, rather than the death sentence be  
6 imposed?" You understand?

7 A. Yes.

8 Q. In other words, first part of trial, guilt or  
9 innocence, you just hear about what happened that day.  
10 You know, that's what they're going to try and prove.

11 A. Right.

12 Q. Okay? And I don't know if they can prove it  
13 or not, okay? Maybe -- maybe the Defendant will be  
14 found not guilty. Maybe State can't prove its case.  
15 But if they find -- if the jury finds the Defendant  
16 guilty, then you answer these questions. And this  
17 part talks about not just what happened that day, but  
18 about everything. Maybe you'll hear about the  
19 Defendant's background, what kind of guy he was. Was  
20 he a good guy, was he a bad guy? You know, did he  
21 help others? You know, is he a bad guy his whole  
22 life, bad criminal history, good criminal history, you  
23 know? That kind of thing.

24 In other words, you have to take  
25 everything, everything that's presented to you in

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1 making this determination, not just the case,  
2 everything that's presented to you, okay?

3 A. (Nods head.)

4 Q. You follow me?

5 A. Yes.

6 Q. And then the jury would answer yes or no to  
7 that question. All right. The beginning of the case,  
8 I am going to ask the jurors that are selected to  
9 raise their right hand and I will -- I will ask them  
10 to take an oath. And that oath is, "Do you solemnly  
11 swear that you will render a true verdict based upon  
12 the law and the evidence presented to you," and they  
13 will say yes, okay.

14 I need to know if you can take that oath,  
15 okay? First of all, I need to take -- know that you  
16 can take the oath to -- based upon the law and the  
17 evidence, to hinder a true verdict, guilty or not  
18 guilty, based upon the evidence in this case. Can you  
19 do that?

20 A. Yes, sir.

21 Q. Okay. And the second part I need to know, if  
22 we do get to the second part and we get to these two  
23 questions, I'm going to -- I'm going to ask if you can  
24 do that. And -- and let me stop you before you answer  
25 because what sometimes people tell me is this, they

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1 say, "You know, Judge, I can't -- I can't answer those  
2 questions because I can't participate in a process  
3 that can lead to someone's death, potentially." Okay.

4 And other people say, "Well, you know  
5 what, if we find him guilty of capital murder, I'm not  
6 -- I'm not going through this process. He gets  
7 automatic death as far as I'm concerned," all right?  
8 But if -- if either one of those is you, that's fine,  
9 okay, but we need to know whether you can take the  
10 oath to answers these true -- these two questions  
11 truthfully or not. Could you do that?

12 A. Yes, I believe I could do that

13 THE COURT: Okay. All right. Well,  
14 then, I'm going to turn the floor over to Mr. Skurka.

15 VOIR DIRE EXAMINATION

16 BY MR. SKURKA:

17 Q. Hello, Mr. Baucom, how are you this morning?

18 A. I'm pretty well.

19 Q. Good. Today we're going to talk about some  
20 things, and follow up some stuff that happened that we  
21 talked about the other day in court that first day we  
22 had all those people in there. I'm going to start off  
23 by telling you there's no right or wrong  
24 answers to anything you say. We just want to know how  
25 you feel, to see if you're qualified as a juror, okay?

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1 A. Yes, sir.

2 Q. I don't want you to answer the question such  
3 a way you think the Judge wants to hear it or the  
4 Defense wants to hear it or I want to hear it. You  
5 just answer it the best way you know how and we'll  
6 deal with that, okay?

7 A. Yes, sir.

8 Q. I see that you're -- you used to work at  
9 Reynolds for some time?

10 A. Yes.

11 Q. How long have you been retired or -- from  
12 Reynolds?

13 A. Just about two years.

14 Q. Two years. What do you like to do with  
15 yourself nowadays?

16 A. I mess around with computers. And then I go  
17 around town passing out Gospel tracts --

18 Q. Okay.

19 A. -- just a couple of days a week.

20 Q. For the church you go to?

21 A. No, no, no. I wrote it myself. It has  
22 nothing to do with any church.

23 Q. Is that right? You wrote your own Gospel  
24 tract?

25 A. That's exactly right.



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1 Q. Tell me what motivated you to do that.

2 A. Well, the things that the Lord has done for  
3 me in my life, and I just wrote that out and give that  
4 out to share with people. And I don't advertise any  
5 particular church or denomination or anything.

6 Q. Uh-huh.

7 A. There's no phone number, address or name on  
8 that thing I pass out. I just pass it out free. It's  
9 one thing that you get in a whole day's time that's  
10 free. Everything else there's some kind of cost, I  
11 don't care what they say.

12 Q. Well, that's very inspirational, sir. That's  
13 nice to do that. And it's good because,  
14 unfortunately, sometimes with churches people have  
15 their own agenda and stuff. And it sounds to me like  
16 you're across-the-board thanking the Lord for what  
17 you've been given and trying to share that, huh?

18 A. Right. I guess, so, yeah, if I understand  
19 your question. I...

20 Q. I understand. Well, I'm just -- because  
21 sometimes people are retired and they just -- I just  
22 like to hear what kind of activities they like to do  
23 and stuff, and I'm just kind of curious what you came  
24 from.

25 Now, you are belonging to the Bay Area

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1 Fellowship Church.

2 A. Yes.

3 Q. Okay.

4 A. Well, I don't really belong, I just attend.

5 Q. You just go to that?

6 A. Right, I just go there.

7 Q. Tell me this, do they have --

8 A. And I don't advertise that.

9 Q. Oh, I understand.

10 A. Yeah.

11 Q. I'm just kind of curious what their position  
12 toward the death penalty is, if they have anything  
13 stated like that, or do they even talk about it?

14 A. They don't talk about it.

15 Q. So you don't know if there's any one way or  
16 the other they are?

17 A. I doubt if they're one way or the other. I  
18 think it's -- I think it's -- each case is different.  
19 I think that's, you know...

20 Q. I understand, and that's fine. I'm just kind  
21 of curious how you feel about it in -- in particular.  
22 If I came up to you on the street and said, "Hey, how  
23 do you feel about the death penalty," how would you  
24 answer that?

25 A. I'd say I'd have to look at the circumstances

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1 that are involved. But as far as the death penalty,  
2 I'm for the death penalty, but according to the  
3 circumstances of the -- of the case.

4 Q. So what you're saying is you support it as  
5 the law, the death penalty; correct?

6 A. Yes.

7 Q. But you're not just going to give it out  
8 willy-nilly. You're going to make sure it's  
9 appropriate in that kind of case?

10 A. Heaven -- yes, sir. That's -- it's a very  
11 important decision. That's...

12 Q. I don't want to put words in your mouth. You  
13 tell us.

14 A. Well, I believe that is one of the most  
15 important decisions that a person will make in a -- in  
16 a pretty good considerable time because that's a --  
17 that's a heavy decision that needs to be weighed  
18 carefully.

19 Q. And I think everybody agrees with you because  
20 you can see we're pretty serious in here about it and  
21 you saw how no one takes it lightly. But I'll be  
22 honest with you, I told you the very first day when  
23 you were called into jury duty, I told all those  
24 people in that room, "The reason you're here is  
25 because the State is seeking the death penalty in this

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1 case." And, you know, I'm -- I don't make bones about  
2 it, you know, that's -- that's what we're seeking.  
3 And I'm -- I'm looking to see if I have a person in  
4 you and the other jurors that can follow through on  
5 that, if they decide it is appropriate in a certain  
6 case. Are you that kind of person?

7 A. Absolutely.

8 Q. And that's what I want to say is because some  
9 -- and, you know, some people are for the death  
10 penalty, some people are against the death penalty,  
11 some people don't know. It doesn't matter to me what  
12 -- what they feel. I'm never going to tell somebody,  
13 "You can't think that way," or, "You can't feel that  
14 way." But put yourself in my perspective. I need to  
15 make sure I have somebody who if I present the case  
16 and they find him guilty under the proper evidence,  
17 and if there's evidence that shows that he should get  
18 the death penalty, can they follow through with it?  
19 And -- because some people say, "Hey, Mark, I'm for  
20 the death penalty. It's a good law. I'm glad we have  
21 it. Crime is out of hand. We need to do something,  
22 but, please, don't make me be the one to do that  
23 answer, to make that decision."

24 Are you that kind of person that you're  
25 worried about making that kind of decision?

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1 A. No.

2 Q. Okay. And -- and what it sounds to me like  
3 you're going to want to wait till you hear everything  
4 and you're not going to pull the trigger too early on  
5 something till you want to make sure everything's  
6 done.

7 A. I wouldn't want to do that on -- I wouldn't  
8 want that done to me and I wouldn't want to do that to  
9 somebody else.

10 Q. That is a very good answer because that's  
11 what we're looking for, jurors who want somebody as  
12 fair as they would be to judge a person if they were  
13 on trial. You can be that person, right?

14 A. Absolutely.

15 Q. Okay. Now, the reason we talk about the  
16 death penalty is because that's a first -- that's one  
17 of the major issues in this case. When you heard it  
18 was that kind of case -- I don't know if you've ever  
19 been called for jury duty before, but, you know,  
20 sometimes on Monday, people come in there and they  
21 think, "Oh, I'm going to get a trespassing case or a  
22 shoplifting case or a D.W.I.," and then they find out,  
23 "Folks, this is a capital murder case. You may have  
24 to make that decision."

25 When you heard that from Judge Galvan a

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1 couple of weeks ago when we were in that big room,  
2 what did you think?

3 A. I was just a little bit surprised.

4 Q. A lot --

5 A. Of course, I had no idea what I was there  
6 for.

7 Q. And nobody did.

8 A. No.

9 Q. And that's exactly right. You come in there,  
10 and -- and, in fact, most of the time if you're on  
11 jury duty, you never know what it is. It's kind of  
12 the luck of the draw. But, I don't know, I'm  
13 wondering if your first reaction was, you know, after  
14 your surprise, what other reaction would you have --  
15 did you have?

16 A. Well, right at first I thought I'm not  
17 qualified to be on this type of jury because that is a  
18 heavy, very weighty decision. And then I -- then I  
19 thought about it and I thought, "Wait a minute, I'm  
20 actually more qualified than most people."

21 Q. Explain that, please.

22 A. Well, I believe --

23 Q. Both of those statements.

24 A. I believe that I would honestly look at the  
25 those -- at the case itself and -- and weigh it -- try

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1 to weigh it just as fairly as I possibly could.

2 Q. Well, why did you think at first that you  
3 wouldn't be qualified, then?

4 A. Well, that's just something -- I've worked  
5 in -- for corporations all my life and just really not  
6 had a lot -- not been very high up the ladder. And  
7 this -- a person is pretty high up the ladder on this  
8 case.

9 Q. Well, let me tell you what I think everybody  
10 will tell you. It doesn't matter about jurors.  
11 Jurors are there to be factfinders. You could be the  
12 president of a company, a doctor, a lawyer, a C.E.O.,  
13 doesn't matter. Anybody --

14 A. Right.

15 Q. -- that -- and that's what need on jurors, a  
16 cross-section of the community. We have housewives,  
17 manual laborers, white-collar workers, blue-collar  
18 workers. It doesn't matter. That's what we want to  
19 have on a jury. We don't want to have, you know, 12  
20 elderly white men on the jury. We want women, we want  
21 diversity, we want Blacks, Hispanics and everything,  
22 and from all walks of life. And, you know, you come  
23 from one walk of life, but the person next to you on  
24 the jury may be somebody completely opposite from you.  
25 Maybe, you know, years younger to you, a different

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1 race, a difficult sex. Does that matter? Of course  
2 not. That's -- that's why we want to have people like  
3 that.

4 So when you said you felt like you may  
5 not be qualified, you just thought because you  
6 didn't -- you hadn't really done -- I'm not sure I  
7 understand what you meant.

8 A. Well, that's just a little bit of weighty  
9 decision. And anytime there's a weighty decision, the  
10 ordinary person would like to just shove it off on  
11 somebody else, but sometimes -- I found out that  
12 sometimes you, yourself, are the qualified one.

13 Q. Uh-huh. Some people -- on that first day, I  
14 saw people out in the audience because I watch their  
15 reaction because I kind of want to see what they look  
16 like, and some of them, I go -- they go (indicating)  
17 and some of them go, "Oh, my gosh, I can't believe I'm  
18 on this case," and they start having like a --  
19 freaking out.

20 And then some people say, "Gosh, that is  
21 a surprise, but I better listen a little closer and  
22 pay attention to what the Judge is saying because this  
23 is a pretty serious case." Is that kind of how you  
24 felt?

25 A. That's how I felt.

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1 Q. Okay. Because you see different types. And  
2 I'm not saying anybody's right or wrong, but some  
3 people will tell us, "You know, Mark, put me on a  
4 D.W.I. case, put me on a shoplifting case. I can do  
5 that, but I don't want to handle that big, awesome  
6 responsibility." So how do you feel about handling  
7 that awesome responsibility?

8 A. I believe I could handle it.

9 Q. Okay. You know, we're talking about stuff --  
10 you know, we always talk about stuff in general. But  
11 in here we're more specific. We're not talking about  
12 the death penalty in some other county or state or  
13 some guy you've seen before. That's him, right there.  
14 Take a look at him. That's John Henry Ramirez. You  
15 understand that I told you the first day there's going  
16 to be a time to come in this trial if you're selected  
17 on this jury that the State is going to come up and  
18 say that, based on the evidence and the circumstances  
19 of this case, you should answer the questions in such  
20 a way that that man gets executed.

21 I want you to look at him and tell me,  
22 can you do that if you think the evidence qualifies  
23 him for that?

24 A. Yeah, if it -- if the evidence qualifies him,  
25 I believe I could.

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1 Q. Okay. Any hesitation about that?

2 A. No.

3 Q. Okay. The other part I want to ask you is  
4 the opposite. Can you look at him and say, "Look, I  
5 know you're innocent, and you're presumed innocent  
6 because the Judge has said that the State has to prove  
7 the case beyond a reasonable doubt." You believe  
8 that, too, right?

9 A. Yeah, I believe that, too.

10 Q. And if the evidence is such a way that you  
11 think that maybe the question should be answered in  
12 such you get a life sentence, can you vote for that,  
13 also?

14 A. Yeah.

15 Q. You -- so what you're telling me is that  
16 you're -- you've got no preconceived notions that --  
17 which way you're going to vote right now; correct?

18 A. No. I --

19 Q. And that's --

20 A. -- don't have any idea.

21 Q. That was -- that's the perfect answer because  
22 you don't want to be that. And you see what -- we're  
23 talking about qualifying jurors is, you don't want to  
24 be leaning too far to the State, you don't want to be  
25 leaning too far to the Defense. You should be right

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1 in the middle about what you're going to do on guilt  
2 -- I'm sorry, on punishment or death penalty or life  
3 sentence.

4 But it's clear that you have to consider  
5 him presumed innocent at this point because you  
6 haven't heard any evidence; correct?

7 A. That's right, I haven't heard a thing.

8 Q. That's right. So if you had to vote for it  
9 right now, you -- you'd have to vote not guilty  
10 because you haven't heard anything.

11 A. I'm absolutely not qualified at this moment.

12 Q. That's right. No, I hear you. And talking  
13 about decisions, a big decision, my gosh, it seems  
14 like you've lived a long, full life, and you've raised  
15 four kids, or so, and been married to the same woman  
16 for 29 years, you've probably made a few hard  
17 decisions in your life.

18 A. Yes, sir.

19 Q. And -- and part of being on the jury is  
20 making those decisions because that's how our system  
21 works, right? I mean, people complain about the  
22 American Justice System, but, you know, show me a  
23 better one, you know? There's -- there's -- sometimes  
24 mistakes happen, but we -- everybody tries to do the  
25 best. And the most important thing to me about the

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1 death penalty is the State can't decide on the death  
2 penalty. This Judge can't decide who gets the death  
3 penalty. Our legislature has entrusted it with the  
4 people, with the 12 people on the jury. So, it means  
5 the people decide. Isn't that a fair statement to  
6 have it that way?

7 A. That -- that's the fairest thing in the  
8 world, I believe.

9 Q. Right. You don't want to have some dictator  
10 saying, "Okay, he gets put to death or she doesn't,"  
11 you know? You don't want to do that. So we rest that  
12 in the power of the -- of the people, which is  
13 probably the best way to do it.

14 Now you understand, too, that sometimes  
15 people looked at -- at him when he first -- when he  
16 came in the room a couple of weeks ago, and they said,  
17 "Man, that's the guy? He looks so young. He doesn't  
18 look like he could hurt a fly." And some people say,  
19 -- well, you know, I think when people have criminal  
20 jury cases they always expect to see Charles Manson  
21 sitting there, you know, some bad-looking guy and then  
22 they see maybe he doesn't look that bad.

23 Would you agree with me that you  
24 shouldn't make a decision as a juror based on how  
25 somebody looks, that you should make a decision on the

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1 way -- what they did?

2 A. Absolutely. You can't tell by looking.

3 Q. Okay. You can't judge a book by its cover,  
4 right?

5 A. Absolutely not.

6 Q. But some people say -- they'll say, "Oh, he's  
7 so handsome," or "She's so pretty," or something like  
8 that. That's not any reason to make a decision, is  
9 it?

10 A. Absolutely not.

11 Q. Okay. And what about people being young or  
12 not? Because sometimes people say, "Well, you know,  
13 he's so young, you know. He's just not very  
14 experienced or something." The law says in Texas the  
15 State can -- you cannot execute a person under 18  
16 years of age. I mean, if it's a juvenile, if he's 16,  
17 17 years old, and he does the worst crime imaginable,  
18 you can't get the death penalty because the law says  
19 you can't. But anything over 18 is -- I guess, the  
20 State recognizes that those people have the mentality,  
21 are grown up enough to know the difference between  
22 right and wrong and the consequences of the action.  
23 Do you agree with that?

24 A. I agree.

25 Q. So it doesn't really matter if you're 21, 31,

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1 41, 51, you're responsible as long as you're over 18;  
2 correct?

3 A. Absolutely.

4 Q. Sure. Now, the reason this is a capital  
5 murder case and -- and that he could face the death  
6 penalty is that this is murder plus robbery, and the  
7 Judge told you what robbery was. It's basically a  
8 forced theft. You steal something, but you hurt  
9 somebody while doing it or threaten to hurt  
10 somebody while doing it. The thing I need to tell you  
11 is it says, "in the course of committing or attempting  
12 to commit robbery."

13 In other words, it doesn't have to be a  
14 necessarily completed robbery, it could be in the  
15 course of committing robbery. Say, for example,  
16 somebody's robbing a bank and they get the bag of  
17 money and they're heading out the door and they get  
18 caught by the police right out the door. Can he go to  
19 court and say, "Hey, I'm not guilty. I didn't get  
20 away with it so I didn't really take the money?"  
21 Well, that's not going to work.

22 The robbery takes place as soon as you  
23 put -- hurt somebody or put them in fear of their  
24 circumstances. Doesn't really matter how much you got  
25 away with or if you got away with anything. That's

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1 still robbery. You follow me on that?

2 A. Yes, sir, I follow that.

3 Q. Okay. And in this case there's two parts to  
4 the trial. The first part is the guilt or innocence  
5 phase, which is basically did he do it or not, and the  
6 second phase is the punishment phase. In the first  
7 part of the trial you generally hear what happened  
8 that day, around the crime, you know, what happened at  
9 the crime itself, maybe before or after the crime, and  
10 what happened -- to just help you determine whether  
11 the person is guilty of that crime. If you don't  
12 think that the person is guilty of the crime and the  
13 State hasn't proved it beyond a reasonable doubt, you  
14 would vote not guilty and the case would be over.

15 But if you do think the State has proved  
16 the case beyond a reasonable doubt you go on to the  
17 second part of the trial. And the second part of the  
18 trial we call "the punishment phase." And,  
19 essentially, you might get to hear additional  
20 evidence. You -- in order to decide what kind of  
21 punishment he gets, you might get to hear what his  
22 background's like. Does he have a good background or  
23 bad background? Is he a good character or a bad  
24 character? You know, has he been to prison ten times  
25 before, or, you know, was he an Eagle Scout in school?

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1 You know, that kind of stuff, to help you make a  
2 decide -- decision on what punishment.

3 The reason you -- you hear all that  
4 evidence, then you answer some certain questions. You  
5 don't just go back there and say, "Well, I vote for  
6 death," or, "I vote for life," and check off the  
7 appropriate box. No, you answer certain questions and  
8 based on how you answer those questions is what the  
9 decision is going to be.

10 The first question is up there behind  
11 you. I'm going to ask you to look at it in more  
12 detail now. It says, "Is there a probability that the  
13 Defendant would commit criminal acts of violence that  
14 would constitute a continuing threat to society?" We  
15 call that "the future dangerousness question."  
16 Basically, do you think he's going to be a danger in  
17 the future, okay? He's done this crime, but do you  
18 think he's going to be a danger in the future.

19 And the key words I want you to look at  
20 is that first line that says, "Is there a  
21 probability." It doesn't say the State has to prove  
22 with certainty because there's no way I could prove to  
23 you for sure what's going to happen, unless, you know,  
24 we have a crystal ball and you can look at the future.  
25 And it doesn't require me to do that. It just says is



1 it probable, is it more likely than not that he would  
 2 commit these other crimes? Follow me?  
 3 A. Yes, sir.  
 4 Q. Because I don't -- nobody can predict the  
 5 future. The next part says, "would commit criminal  
 6 acts of violence." That's pretty broad, "criminal  
 7 acts of violence." Sometimes people say, "Well, we  
 8 could only give the death penalty if we think he's  
 9 going to actually commit another murder or another  
 10 capital murder." And I tell them, "No, it doesn't say  
 11 it has to be murder. It says says 'any criminal acts  
 12 of violence.'" Could be, you know, kicking somebody,  
 13 assaulting somebody, beating them up, whatever it is.  
 14 Could be -- so it doesn't necessarily have to be some  
 15 -- you think he's going to commit another murder.  
 16 And the last line says, "that would  
 17 constitute a continuing threat to society." Have you  
 18 ever heard that phrase before?  
 19 A. Yes, sir.  
 20 Q. And what does that mean to you?  
 21 A. That somebody's going to be a nuisance out  
 22 there.  
 23 Q. Okay. Probably a little more than a  
 24 nuisance.  
 25 A. Well, yeah.

1 Q. But the point is, could he commit criminal  
 2 acts of violence in the future and be a threat to  
 3 society?  
 4 A. Exactly.  
 5 Q. Well, sometimes people say, "Well, gosh, why  
 6 do you have to put him -- do the death penalty? Why  
 7 don't you just lock him up in prison? Give him a life  
 8 sentence and he's in prison, he won't hurt anybody."  
 9 And I always have to remind them, "Wait a minute, who  
 10 else is in a prison besides that person?" Tell me.  
 11 A. Other people like him.  
 12 Q. That's right. Other inmates. There's guards  
 13 there. There's probably people that work in the  
 14 prison, like, you know, maintenance people or the  
 15 warden and his family. In other words, we don't have  
 16 like a desert island where you set them out there and  
 17 they never have any human contact again, right.  
 18 So prison is actually part of society. I  
 19 mean, you've got some rights taken away from you, but  
 20 would you agree with me you're still seeing other  
 21 people, still interacting with other people?  
 22 A. Yes, sir.  
 23 Q. So the fact that they put somebody in prison,  
 24 does that mean they'll never hurt somebody again?  
 25 A. No. Absolutely not.

1 Q. And why is that? Have you ever heard about,  
 2 you know, prisoners attacking other prisoners or  
 3 prisoners attacking guards, you know, things like  
 4 that?  
 5 A. Yes, sir.  
 6 Q. It happens, right?  
 7 A. That's right.  
 8 Q. In other words, it's not fool proof that they  
 9 can't hurt anybody just because you lock them up,  
 10 right?  
 11 A. Exactly.  
 12 Q. Okay. So that's kind of what that question  
 13 says. Is there a good chance, is it probable that the  
 14 Defendant would commit criminal acts of violence that  
 15 would constitute a continuing threat to society? And  
 16 you answer that question yes or no.  
 17 Then you go to the second question. And  
 18 read it with me up, here. The Special Issue No. 2, we  
 19 call that "the mitigating circumstance question."  
 20 Mitigating circumstance is a word that basically means  
 21 "anything that would lessen or make less severe the  
 22 punishment."  
 23 A. That's what this word "mitigating" means.  
 24 Big word. Some lawyer dreamed it up, probably. But  
 25 basically, that's what it means, is there any reason

1 to lessen or make less severe the punishment? In  
 2 other words, he did the crime, but is there any reason  
 3 that you should give him a break for it and give him  
 4 life, instead of the death sentence.  
 5 What is a mitigating circumstance is up  
 6 to the jury to decide. Essentially, you can think of  
 7 it kind of like the opposite of aggravating  
 8 circumstances. You know, there's certain things that  
 9 are aggravating circumstances and certain things that  
 10 are mitigating circumstances.  
 11 Let's get away from the law talk for a  
 12 minute and give you an example. Say, for example,  
 13 you're called on a jury on two burglary cases.  
 14 There's two burglars. They're both equally guilty of  
 15 burglary because they both went into somebody's house  
 16 and stole something that didn't belong to them.  
 17 That's burglary, okay.  
 18 And so you're sitting there and you're a  
 19 homeowner and you're thinking, "Man these guys are  
 20 both burglars. This is bad. I'm going give them a  
 21 high sentence because they're both burglars."  
 22 And then you hear the surrounding facts  
 23 and circumstances. And the first burglar, the guy has  
 24 broken into a house. He's kicked in the door. He's  
 25 gone in the house and ransacked the house, torn it up,

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1 taken all the money, all the jewelry, all the T.V.s,  
2 V.C.R., stereos, all that stuff of value, taken it all  
3 away. And you also hear that -- in the punishment  
4 phase of the trial that this isn't his first burglary.  
5 He's been to prison seven times before for guess what?  
6 Burglary. Okay? That's your first burglar.

7 Now, switch the scenario to the second  
8 burglar. Here's the second burglar. The second  
9 burglar has also gone into somebody's house and taken  
10 something without permission, but then you hear the  
11 surrounding circumstances of the background. And  
12 they're like this. This burglar didn't kick in the  
13 back door. The back door was unlocked and he went  
14 into the kitchen. He goes into the kitchen and he  
15 steals a loaf of bread and some food because he lost  
16 his job and he needed some food to feed his kids.  
17 They were hungry.

18 The house had jewelry and money and T.V.s  
19 and V.C.R.s and stereos. He didn't take any of that  
20 stuff. All he did was take the food. And you also  
21 find out, what about his background? This guy hadn't  
22 been to prison seven times for burglary. This is the  
23 first time he's ever been arrested in his life. He  
24 doesn't have any prior criminal history.

25 Now, when you first started out, right,

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1 they're both burglars, right? Would you treat those  
2 burglars the same? Probably not, right? One of them  
3 has aggravating factors and you'd probably make it a  
4 higher sentence, and the other burglar has mitigating  
5 circumstances to make it less. So mitigating is just  
6 a big, fancy word saying is there any kind of  
7 circumstances or reason that you should lessen the  
8 sentence? I don't think anybody sitting on a jury  
9 would give that second guy the same thing you got the  
10 first guy, right?

11 A. That's right.

12 Q. I mean, there was -- you didn't know that at  
13 first, right, until you heard everything. You thought  
14 he was just another darn burglar. But then when you  
15 find out, hey, he just stole food, he didn't steal the  
16 other stuff, and he didn't kick in the door. He went  
17 in, it was unlocked, and he's never been arrested  
18 before, it makes a difference to you, right?

19 That's kind of what question addresses,  
20 Mr. Baucom, that, "Is there enough mitigating  
21 circumstance to warrant that a sentence of life in  
22 prison be imposed, rather than death?" What is a  
23 mitigating circumstances is up to the folks on the  
24 jury. This Judge is not going to tell you, "Well, you  
25 heard this and you automatically have to lower the

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1 sentence." It's got to be enough to lower the  
2 sentence to life instead of death.

3 In other words, you may hear, "Well, he  
4 was a war hero; or you know, he made straight A's in  
5 school, he was on the honor roll; he helped little old  
6 ladies across the street," but you also made hear that  
7 he's been to prison ten times before, you know what  
8 I'm saying? So you have to wait till you hear  
9 everything and then if you hear it, is it enough to  
10 make it go lower?

11 So to sum up, it's kind of like this, say  
12 you had found him guilty of capital murder, he's  
13 guilty of doing the crime. You look at the special  
14 issue and you say, "Yes, I think he is -- there is a  
15 chance he's going to commit other criminal acts that  
16 might hurt somebody in the future." But before you --  
17 and looks like he's heading toward the death penalty,  
18 but the Judge says, "Stop, jury, wait. Before you  
19 impose the death penalty, look in -- take into  
20 consideration all of the evidence, everything you've  
21 heard in the courtroom, including the circumstances of  
22 the offense," that means, you know, what happened that  
23 day and the surrounding circumstances, "the  
24 Defendant's character and his background," you know,  
25 does he have good character, bad character, good

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1 background, bad background, "and his personal moral  
2 culpability," is there enough, is there enough reasons  
3 "To warrant that a sentence of life, rather than a  
4 death sentence be imposed?"

5 It's kind of like a balancing test you  
6 have to do. You have to say, "Okay, I think he's  
7 guilty, I think he's a future danger, but is there any  
8 reason I should give him a life sentence?" If there  
9 is, then you give him a life sentence and vote yes.  
10 If there isn't, you say no, and he gets a death  
11 sentence. If you answer the first question yes and  
12 the second question no, this Defendant is sentenced to  
13 death. You see how it is? You don't just vote yes or  
14 no for death or life, you answer these questions.

15 What do you think of that, you think  
16 that's a pretty fair system to check on the jury to  
17 make sure they've covered everything before they make  
18 that big decision?

19 A. Yes, I think that is very fair.

20 Q. And wouldn't you want to know what his  
21 background is, you know?

22 A. Absolutely.

23 Q. Okay. Remember, though, he can testify if he  
24 wants to, if he doesn't want to, he doesn't have to.  
25 You can't hold that against him, okay? And you can



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1 also make the decision based on just the heinousness  
2 of the crime itself. If the crime is a real terrible  
3 crime and he's never been to prison before or never  
4 been arrested before, you -- that doesn't mean you  
5 don't have to do it.

6 In other words, it's not just a  
7 first-time offender. It can be anybody get the death  
8 penalty, whether they've been to prison ten times or  
9 never been to prison before. You follow me on that?

10 A. Yes, sir.

11 Q. But you got to look at everything. And will  
12 you keep an open mind about these things?

13 A. Yes, sir.

14 Q. And -- and if there is some type of thing  
15 that says, "Hey, I didn't think about that, but maybe  
16 that would make me lower the sentence," could you  
17 lower the sentence to life, instead of death?

18 A. Yes.

19 Q. Depending on what you hear --

20 A. Right.

21 Q. -- right? And that's the bottom line what  
22 you have to do.

23 One of the other things that the law says  
24 is this, "Voluntary intoxication is not a defense to  
25 crime." Voluntary intoxication. In other words, if

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1 you go get yourself drunk or high on drugs and you  
2 commit a crime, can you say, "Hey, I'm not guilty. I  
3 was drunk when I did that crime." No, absolutely,  
4 not. The law says voluntary intoxication is not a  
5 defense to crime. The law also says, though, it may  
6 be considered as a possible mitigating circumstance.  
7 You know, some people will say, "Well, he robbed that  
8 bank, but he was drunk when he did it, so I'm going to  
9 give him a break." Other people may say, "I don't  
10 care if he was drunk or not when he robbed that bank,  
11 he's still got to pay for what he did. He's got  
12 suffer the consequences. It was his own fault he went  
13 out and got drunk or high on drugs." You follow me on  
14 that?

15 A. Yes, sir, I understand that.

16 Q. All right. So mitigating circumstances are  
17 up to the jury and what effect you give it is up to  
18 the jury, too. You just have to be open-minded and be  
19 able to listen to everything. Can you do that?

20 A. Yes, sir.

21 Q. Okay. The last few parts I want to cover  
22 with you are some legal questions, just to kind of go  
23 over them. Remember, just the fact that he's been  
24 indicted by the grand jury doesn't mean he is guilty.  
25 That just means he's charged with it. The State still

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1 has to prove the case beyond a reasonable doubt. You  
2 follow that?

3 A. Yes.

4 Q. Because some people say, "Well, he's sitting  
5 there. He must have done something. He must be  
6 guilty." And we have to say, "No, everybody is  
7 presumed innocent until the State proves he's guilty  
8 beyond a reasonable doubt." Can you do that?

9 A. Yes, sir.

10 Q. And you believe he's innocent until he's  
11 proven guilty, right?

12 A. Yes, sir.

13 Q. And the Fifth Amendment. He can testify if  
14 he wants to, but if he doesn't want to, he doesn't  
15 have to. And the law says you cannot hold it against  
16 him. Some people -- and it's kind of a natural thing,  
17 people say, "Well, I want to hear the other side of  
18 the story. I want to hear what he says." But I think  
19 you mentioned it earlier with the Judge, some people  
20 don't testify for whatever reason. But the point is,  
21 if he doesn't testify, I'm pretty sure this Judge is  
22 going to tell you you can't hold that against him.  
23 Would you be able to follow that law?

24 A. Yes, sir.

25 Q. Beyond a reasonable basically means that I

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1 have to prove the case beyond a reasonable doubt, and  
2 it's the burden in this case or any case, it doesn't  
3 really matter. All I can tell you is it doesn't mean  
4 proof beyond all doubt or any doubt or shadow of a  
5 doubt. You always hear it on T.V., right, beyond a  
6 shadow of a doubt. That always kills me because  
7 that's not what the true standard is.

8 The law doesn't say I have to prove it to  
9 you beyond all doubt or any doubt. I mean, it would  
10 be hard for me to do that unless you were a witness  
11 and saw the whole thing, but the law doesn't require  
12 me to. It just says beyond a reasonable doubt. So  
13 the first thing I always tell me is, "Well, do you  
14 have a doubt? And, if you have a doubt, is there a  
15 reason for a doubt? Is there a reason for it, you  
16 know?"

17 Let me see if there's any other questions  
18 I want to cover with you. You understand that police  
19 officers are treated just like anybody else on the  
20 stand. They're not any better or any worse. So if  
21 you have a policeman testify, they're -- they're not  
22 given any extra special credit just because they're  
23 cops. You see what I'm saying?

24 A. Yes, sir.

25 Q. The law says every citizen is treated the

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1 same, so whether it's the nun or a priest or a  
 2 preacher or a cop gets up on the stand, they're still  
 3 all equal. Do you believe that?  
 4 A. Yes, sir.  
 5 Q. Okay. And you can't just believe everything  
 6 they say just because what they -- what they do or  
 7 what their job is. You feel like you could be on this  
 8 jury?  
 9 A. Yeah, I feel I could.  
 10 Q. You feel you can be fair to both sides?  
 11 A. Yes, sir.  
 12 Q. You feel that you'll wait till you hear  
 13 everything before you make a decision?  
 14 A. Yes, sir.  
 15 Q. And if you make a decision, can you carry  
 16 through with it?  
 17 A. Yes, sir.  
 18 Q. Okay. Do you have any questions of me, Mr.  
 19 Baucom, because maybe I didn't explain something very  
 20 well or anything that I can go over with you?  
 21 A. You went over it pretty well. Yeah, I think  
 22 you've done it before.  
 23 MR. SKURKA: Well, I've been -- I've been  
 24 working here 22 years, but I just try to make sure  
 25 that everybody follows everything. Thank you so much

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1 for your time, Mr. Baucom.  
 2 VENIREPERSON NO. 44: Thank you.  
 3 MR. SKURKA: I'll let the Defense  
 4 attorneys talk to you now.  
 5 VOIR DIRE EXAMINATION  
 6 BY MR. JONES:  
 7 Q. The -- under the Texas law and the federal  
 8 law, the person -- citizen who's been charged with a  
 9 crime has a right to trial by jury. In a felony case,  
 10 he has the right to be tried by a jury of 12 citizens.  
 11 Not only does the Defendant in this case, because he's  
 12 a citizen, have a right to a jury of 12, he has a  
 13 right to have that jury be impartial. A  
 14 constitutional right to jury trial is a right to an  
 15 impartial jury. You understand that?  
 16 A. Yes, sir.  
 17 Q. What does that word, "impartial," mean to  
 18 you?  
 19 A. Somebody that's going to judge that trial  
 20 based on those facts as they're given, not on some  
 21 preconceived notion that they've got made up in their  
 22 mind.  
 23 Q. Okay.  
 24 A. They're going to look at it from ground zero.  
 25 Q. Well, one factor, one part of the definition

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1 of impartiality is just what you said. A person who  
 2 is impartial comes to the task with no prejudgments  
 3 about -- about the matter. They have a, as the Judge  
 4 said, open mind.  
 5 Also, impartiality suggests that the  
 6 juror has no leanings toward one side or the other.  
 7 Those are biases. For example, if you were related to  
 8 the Defendant, you're an uncle or, you know -- you  
 9 would have a family bias. If you were related to the  
 10 injured -- the person that got killed in this case,  
 11 you would have a relational bias, okay, maybe a family  
 12 bias.  
 13 They're all kinds of biases. There are  
 14 occupational biases. For example, if I am trying an  
 15 arson case, I'm not likely to put a fireman on my  
 16 jury. Why?  
 17 A. Well, he may have a little bias about that  
 18 one.  
 19 Q. Okay. I want -- I want firemen to be biased  
 20 against fires, okay? I want policemen to be biased  
 21 against drunk drivers, et cetera, okay? I want  
 22 emergency room doctors who sew people up to be biased  
 23 against gunshot wounds and stabbings and those kind of  
 24 things. All right?  
 25 A. Yes, sir.

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1 Q. But in -- in -- so you can imagine different  
 2 occupations might bring a bias to the courtroom, just  
 3 because that's the way it is. Might be hard for them  
 4 to hear the case.  
 5 Now, one of the questions that the Judge  
 6 asked you or mentioned to you was about the Fifth  
 7 Amendment. The Fifth Amendment says that a defendant  
 8 does not have to testify, and also says that if he  
 9 doesn't, you can't use that against him. That's one  
 10 of the most difficult rules to follow, okay, because  
 11 -- because -- I always say the street logic says, the  
 12 street morality says that, you know, "If a person  
 13 didn't do it, he ought to get up and say so, okay? I  
 14 want to hear both sides of the story," okay? But in  
 15 the -- in our criminal law system, that's not the  
 16 case. The Defendant doesn't have to say anything,  
 17 doesn't have to testify and the State can't argue he's  
 18 guilty because he remains silent.  
 19 Do you -- do you agree with that rule.  
 20 A. Yes, I absolutely do.  
 21 Q. Why?  
 22 A. Because a person that's not a good testifier  
 23 and a good talker could get up there and just say the  
 24 wrong thing, and the jury take it wrong and understand  
 25 it wrong --

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1 Q. Uh-huh.

2 A. -- and he could actually be hurting himself,  
3 and -- unintentionally, by his own words, and be  
4 misunderstood or something from that jury. So it's  
5 really -- I would say, right off hand, a lot of times  
6 it's better for a guy not to say anything because he's  
7 not a professional talker.

8 Q. Any other reasons why you agree with that?

9 A. And that's probably the reason you need to  
10 hire an attorney.

11 Q. Okay.

12 A. Any reason for what, now?

13 Q. For the right to remain silent.

14 A. I don't know. That's in the Constitution, so  
15 there's -- there's a reason, but I -- I don't know.

16 Q. Who has -- who brings the charges in a  
17 criminal case?

18 A. That's right, the State does. So they're the  
19 only ones that really have to say anything.

20 Q. Okay.

21 A. I forgot about that.

22 Q. Who has the burden of proof in a criminal  
23 case?

24 A. The State.

25 Q. Now, I may have misunderstood you, but the

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1 Judge said -- he said, you know, the Defendant doesn't  
2 have to testify and -- and would you hold that against  
3 him and you said, "No, I think it's a good idea for  
4 him not to testify." And I -- I -- the way you said  
5 it, I -- I sensed that you thought it was a good idea  
6 because if he gets up, he's going to incriminate  
7 himself, you know.

8 And -- in other words, he's going to --  
9 you had an assumption there that he's probably guilty  
10 and then it would be stupid for him to get up and  
11 testify.

12 A. No. If he is guilty, he could incriminate  
13 him -- I mean, he could -- if he's not guilty, he  
14 could get up and testify and incriminate himself in  
15 the mind of the jury. They're hearing things through  
16 their own filter and he could say the wrong thing,  
17 unintentionally, and not being on the same plain as  
18 some of them are. And so he could incriminate  
19 himself, even if he's not guilty. If he is guilty,  
20 well, you know, but...

21 Q. Well, sitting here right now, do you have any  
22 feelings that the Defendant is guilty and if you're  
23 picked on the jury, you're simply going to be looking  
24 for confirmation of -- of what you already feel?

25 A. I really don't -- I don't know what I feel.

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1 I don't know what I'd feel, actually.

2 Q. Well, ideally, if you're -- if you're picked  
3 as a juror, you should come to the task with no  
4 expectations. You don't know what happened. I don't  
5 know, you know? The State said -- has charged this  
6 Defendant with a crime. The State has the burden of  
7 proof. I don't know whether the State can prove it or  
8 not, okay? I'm here to see, okay? Could that -- does  
9 that -- would that be your -- your position if you  
10 started --

11 A. Yes, I believe so.

12 Q. Okay. You qualified your answer, "I believe  
13 so."

14 A. Yeah, well, I -- I'm not a God. I have -- I  
15 have to qualify everything I say, yeah.

16 Q. Okay. Now, do you believe in the -- in trial  
17 by jury?

18 A. Absolutely.

19 Q. Why do you believe in trial by jury? Why is  
20 that important, especially in a criminal case?

21 A. Well, I've read a little bit about it, not  
22 much. But the jury of the peers, like he -- like he  
23 said about the break-in on the house, where the guy --  
24 two people broke in houses. And that's the reason the  
25 law says, you break in a house, bingo, you're adios

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1 to, you know, get some kind of punishment, whatever it  
2 says. But that's the reason you have a jury is to  
3 kind of interpret, well, this guy -- one person --  
4 there's some big difference between those two robbers,  
5 I mean, the two -- not robbers, thieves, big  
6 difference there, and that's what the jury is for is  
7 to look at those things involved --

8 Q. Well, a judge can do that.

9 A. -- and temper the law.

10 Q. Well, a judge could do that. Why don't we  
11 have just have judges set punishment?

12 A. Well, that's -- that's what they do in some  
13 other countries and I -- it's --

14 Q. I just wanted to --

15 A. We have a jury by peers here, you know, which  
16 you know better than I do --

17 Q. Why don't we just let the chief of police  
18 decide it? He investigated the case and he says the  
19 guy's guilty, that should be good enough, right?

20 A. No. He'd let all his relatives go and  
21 everybody else would go to -- get the penalty.

22 Q. Okay. Well --

23 A. I mean, I don't know the new police -- oh,  
24 well, yeah, I do, but -- not really, but I've seen his  
25 name.

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1 Q. We don't normally think about this, but, you  
2 know, every society, including our own, has to have a  
3 system of -- of laws which define what conduct is  
4 forbidden. We have to have a system for enforcing  
5 those laws. And we have to have a system of sanctions  
6 for people who choose not to follow the law, okay.

7 And, now, from -- from where does that  
8 power come? Where does the government get its power  
9 in this country?

10 A. Get it from the people.

11 Q. That's right. And we just did it about a  
12 week ago, didn't we, on November the 4th? We put in a  
13 bunch of new -- put in a new president, governors and  
14 a bunch of other people, right?

15 A. Yes, sir.

16 Q. All right. So the -- in the United States  
17 the power of the government comes from the electorate.  
18 Who's on the jury?

19 A. The people.

20 Q. The people. It's a little cross-section of  
21 the people, right, from this -- from this county, this  
22 judicial district, right?

23 A. Peers.

24 Q. Now, so under our system, before the  
25 government can declare someone guilty of a crime and

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1 -- and impose a sanction on him, it's got to get the  
2 approval of the source of the power, namely, the  
3 people, okay? That's the jury. Do you agree with  
4 that?

5 A. Yes, sir.

6 Q. You think that's a good way to do business?

7 A. Best in the world.

8 Q. Okay. So the jury is an -- is an independent  
9 body. It's actually part of the Judicial Branch, but,  
10 as it functions, it's an independent body. It's not a  
11 rubber stamp of the district attorney's office or the  
12 court or any -- or the police department or anybody  
13 else. They sit apart, okay, and they -- they come  
14 into the courtroom and -- and say, "Okay, Mr.  
15 Prosecutor, you say you've got an indictment, here.  
16 Let's hear it, okay? And I'm not going to let you do  
17 anything unless you prove what you say beyond a  
18 reasonable doubt. If you can't do it," then what --  
19 what are you going to do in that case?

20 A. Not guilty.

21 Q. Not guilty. That's what not guilty means, is  
22 it not? It means the State hasn't proved their case.

23 A. Yes, sir.

24 Q. Do you agree with that system that a person  
25 who's been found not guilty should be -- should be

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1 discharged?

2 A. Yes, sir, yeah.

3 Q. Don't you run the risk of from time to time  
4 of letting a person who's actually guilty go free?

5 A. There's risk, yeah.

6 Q. Okay. Is it worse to convict an innocent  
7 person or to let a guilty person go free? Which is  
8 worse?

9 A. It's probably worse to -- oh, worse to  
10 convict a -- I mean, to convict a innocent person.

11 Q. That's right. Have you read stories -- it  
12 seems like in the last couple of years there's been a  
13 lot of stories in the newspaper, on the television,  
14 some magazines have picked up the stories about cases  
15 coming, particularly out of Dallas County, about  
16 people who have been convicted of various crimes,  
17 particularly sexual crimes, only to be found later  
18 that they were factually innocent because the D.N.A.  
19 testing showed that they were?

20 A. Oh, yes, sir.

21 Q. When you read a story -- have you read those  
22 stories like those?

23 A. Oh, yes, sir.

24 Q. When you read a story like that, how does it  
25 make you feel?

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1 A. I feel like society's wrong. I've seen  
2 people have been locked up 15, 20 years, and I  
3 thought, boy, that's horrible.

4 Q. Okay. So does it make if you feel bad when  
5 you read a story about -- you feel bad for the --

6 A. Sure does, sure does.

7 Q. So you have to -- you have to confront the  
8 fact that in our -- in our system innocent people can  
9 be convicted from time to time because we're  
10 imperfect, right?

11 A. Absolutely.

12 Q. Okay. Now, we go to great ends to avoid  
13 that. It mean, like beyond a reasonable doubt is the  
14 standard of proof in a criminal case, okay.

15 Why do you think the legislature imposed  
16 that high standard of proof, the high degree of  
17 certainty required by beyond a reasonable doubt? Why  
18 -- why do you suppose that that's applied to criminal  
19 cases, rather than some lesser standard like  
20 preponderance of the evidence or probable cause?

21 A. Because this is something more serious.

22 Q. Why is it more serious?

23 A. It's more serious than just a fine or  
24 something like that.

25 Q. What's at stake in a felony criminal case?



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1 A. A person's freedom or their life.  
 2 Q. You got it. It's American -- our American  
 3 Civilization values what above all?  
 4 A. Life.  
 5 Q. Liberty.  
 6 A. Yeah, liberty, freedom.  
 7 Q. Okay. And so we set it up. Before the  
 8 government can take that away, we've got to be sure  
 9 that it's necessary. We want to be right. We just  
 10 don't want to do it off -- off-the-cuff, right? Do  
 11 you agree with that?  
 12 A. Absolutely.  
 13 Q. Now, in a -- I'm working up my way to another  
 14 question, here. In -- in criminal cases, we have an  
 15 elaborate appeal process. If the Defendant is found  
 16 guilty, he has a right to appeal this case. It can go  
 17 up all the way to the Supreme Court of the United  
 18 States, depending on what the issues are.  
 19 And the purpose of that appeal process is  
 20 to correct mistakes. We have don't like to make  
 21 mistakes. If we think a big one has been made we have  
 22 a machinery for correcting it. Like those guys that  
 23 got released in Dallas after serving -- there was --  
 24 there was an appellate remedy that allowed that to  
 25 happen, okay? The good news for those guys were is

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1 they were alive, okay? If they had been convicted of  
 2 capital murder back then, and -- 20 years ago, they  
 3 probably would be dead now, right, because the  
 4 sentence would have been carried out.  
 5 A. Yes, sir.  
 6 Q. Okay. Now, on your questionnaire, on page  
 7 26, it has the scale thing, and, you know, like, it  
 8 says, "How strongly do you believe in the death  
 9 penalty? Circle one to ten." And you -- you selected  
 10 ten being the strongest. Why did you select ten?  
 11 A. Run that -- some of those questions were kind  
 12 of difficult to --  
 13 MR. JONES: May I approach?  
 14 THE COURT: Yeah.  
 15 VENIREPERSON NO. 44: Yeah, run the  
 16 question by me. I'd have to look at that question.  
 17 MR. JONES: We'll let you look at it  
 18 directly, okay?  
 19 THE COURT: Why don't you look at it. I  
 20 have to make -- I have to make a short phone call. Be  
 21 right back. In the meantime, can you look at it?  
 22 VENIREPERSON NO. 44: Sure.  
 23 MR. JONES: Just look at it, so you'll  
 24 know what I'm -- this part right here.  
 25 VENIREPERSON NO. 44: Let's see. Oh,

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1 yeah.  
 2 (Document perused.)  
 3 (Short recess.)  
 4 THE COURT: All right. Sorry about that,  
 5 guys.  
 6 Q. (BY MR. JONES) Okay. We're back on the  
 7 record. Now, let's see, I was asking you about the --  
 8 your questionnaire, there. You selected ten on that  
 9 scale.  
 10 A. Yes, sir. I remember that question. That  
 11 question on the piece of paper, here, you ask for a  
 12 cut and dried answer, and without any -- I put ten  
 13 there, thinking in my mind that if the evidence and  
 14 the whole -- all the criterion were met and everything  
 15 presented, that I do believe in the death penalty.  
 16 But then, again, if it didn't meet all those  
 17 criterion, then I'd put a one.  
 18 So, in other words, this is asking the  
 19 question without any qualification, so it's really a  
 20 --  
 21 Q. That -- that's why I'm asking you --  
 22 A. Yeah.  
 23 Q. -- if you want to clarify it. You weren't  
 24 just saying that from a political standpoint I'm  
 25 strongly in favor of the death penalty?

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1 A. Absolutely, yeah, I'm --  
 2 Q. You're not saying that?  
 3 A. Right, I'd have to look at each case myself.  
 4 Q. Okay. Now, you've said that you're generally  
 5 in favor of the death penalty as being a form of  
 6 punishment that we should have in Texas.  
 7 A. Yes. If the individual case warrants it.  
 8 Q. I understand. But it's a -- it's a type of  
 9 punishment which the legislature has authorized --  
 10 A. That's right.  
 11 Q. -- for certain kinds of cases. Obviously,  
 12 they're the more serious cases, right?  
 13 A. Yes.  
 14 Q. But you believe that that's a good idea to  
 15 have that option.  
 16 A. I think so. But, you know, I'd have to look  
 17 at the case. I mean, I couldn't say for a particular  
 18 case.  
 19 Q. No, just generally.  
 20 A. In generally, yes.  
 21 Q. Generally.  
 22 A. Generally, I think it's a good option.  
 23 Q. Okay. Now, why -- why do you think our  
 24 society benefits from having that option, from having  
 25 the death penalty? What -- I mean, the legislature

1 passed it. I'm sure they debated it and talked about  
2 it and -- and I'm sure they discussed how our society  
3 would benefit by having the death penalty as an option  
4 in some serious cases.

5 How do you feel about that or how do you  
6 think our society benefits

7 A. Well, there's a lot of controversy about  
8 that, but --

9 Q. I want to know what you feel.

10 A. Well, the way I feel is that we have -- we do  
11 have the best trial system in the world.

12 Q. Okay.

13 A. We have the jury that can look at the case.  
14 So it's -- the death penalty, in other words, it's not  
15 automatic.

16 Q. Uh-huh.

17 A. So each case has to be judged on its own  
18 merit. And if a case warrants it, they get -- the  
19 death penalty is available. If the case doesn't  
20 warrant the death penalty and maybe life imprisonment  
21 or something else, then that's also available. So  
22 this -- this way everything is available and each case  
23 has to be judged on its own merit.

24 Q. I -- with all due respect to you, sir, I  
25 don't think you answered my question.

1 A. Oh, I'm sorry.

2 Q. What I'm saying is what benefit do we enjoy  
3 or experience from having the death penalty as a form  
4 of punishment?

5 A. What benefit? Well --

6 Q. Society. What -- how are we better off by  
7 having that, rather than not having it?

8 A. Well, one thing is, I learned, I hadn't  
9 thought about before, but in that prison, that is a --  
10 there are other people in there in danger. And so,  
11 that -- that's one benefit right there.

12 Q. Okay. That it would remove certain people  
13 from our midst, right?

14 A. Right, or inside the prison, even, you know?

15 Q. Okay. So is that -- is that the benefit that  
16 you think we -- we enjoy or experience, that certain  
17 people will be removed from society permanently so  
18 they can't cause us anymore problems?

19 A. It may send a message to potential criminals.

20 Q. Okay.

21 A. To a certain degree.

22 Q. That would be a benefit. It would be a  
23 deterrence to others who might be inclined to commit  
24 those kinds of offense.

25 A. That's right.

1 Q. Okay. So removal and deterrence are the two  
2 things that would you think about as a benefit, right?

3 A. Yes.

4 Q. Okay. You know, most people don't get into  
5 this discussion every day, so you're --

6 A. Yeah, it's --

7 Q. -- we're hitting you cold with it. I can see  
8 your brain --

9 A. Yeah.

10 Q. -- turning and thinking about these  
11 questions, but this is our only chance to talk to you.

12 A. Yeah.

13 Q. Now, we've discussed the -- the reality that  
14 from time to time, you know, innocent people will be  
15 convicted of crimes. Do you think the benefits of the  
16 death penalty are -- are worth from time to time  
17 executing an innocent person?

18 A. Well, one thing I think is that there's --  
19 Texas is pretty high on the list for -- in the nation.  
20 But overall, out of the number of crimes that are  
21 committed, there's only a very few people get the  
22 death penalty.

23 Q. Okay.

24 A. Percentage wise. I have no idea -- you  
25 fellows would know, but I have no idea, but it's not a

1 huge number percentage wise.

2 Q. Okay.

3 A. So...

4 Q. So, in other words, if by chance maybe 1 in  
5 300 death penalty cases an innocent man is executed,  
6 that's -- that's a cost that you're willing to pay in  
7 order to have the benefits of the death penalty?

8 A. I -- I don't think that that many -- I don't  
9 think that happens that much.

10 Q. Okay. But -- but even if it happens anytime,  
11 you're -- you're willing to accept that as a -- as one  
12 of the costs of having the benefit?

13 A. That's a potential thing that could happen.

14 Q. Okay. You know, like the National Rifle  
15 Association said that people have -- having handguns  
16 is a right that's -- that's so important that it's --  
17 that's it's -- was willing to have it at the price of  
18 people being shot from time to time, you know? So --  
19 okay, well, I think you answered my question.

20 Now, under the Texas procedure that the  
21 Judge explained to you in -- in the opening and that  
22 Mr. Skurka went over, the jury -- if the jury finds a  
23 person guilty of capital murder, what other -- what  
24 two punishments are available?

25 A. Life in prison or the death sentence.

1 Q. That's right. There's only two options.  
 2 A. That's right.  
 3 Q. Now, the jury today, in 2008, does not --  
 4 faced with that decision does not go back in the jury  
 5 room and write life or death on a piece of paper, on a  
 6 verdict form. Instead, they're given these two  
 7 questions. What these two questions do is determine  
 8 whether two conditions exist, and the legislature says  
 9 that if these two conditions exist, then the death  
 10 penalty is -- is automatic, okay?  
 11 A. Uh-huh.  
 12 Q. If they don't exist, then the life sentence  
 13 is automatic. So what are the two -- Well, there's  
 14 actually three conditions that have to be met before a  
 15 person can get the death penalty in Texas. What is  
 16 the first one?  
 17 A. Well, see, the first one is it a capital, a  
 18 murder?  
 19 Q. They have to be found guilty of the offense.  
 20 A. Right.  
 21 Q. Okay. All right, given that, then there's  
 22 two more conditions. What is the next condition?  
 23 A. Let's see. Okay, capital murder. And then I  
 24 guess this one (indicating).  
 25 Q. Okay. How does that question have to be

1 answered? What finding has to be made there before --  
 2 to meet one of the conditions?  
 3 A. They'd have to say yes.  
 4 Q. That's right, exactly. It's got to be a --  
 5 call that "a continuing threat."  
 6 A. Right.  
 7 Q. Okay. And this -- there has to be evidence  
 8 on that and you have to find that beyond a reasonable  
 9 doubt.  
 10 A. Yes.  
 11 Q. Now, the Judge will instruct you, if we get  
 12 that far, that if you answer that question no your  
 13 deliberation stops. And the Judge -- the verdict form  
 14 and the Defendant gets what punishment?  
 15 A. Not guilty.  
 16 Q. Exactly. Okay. Because that condition can't  
 17 be met.  
 18 THE COURT: Rather life.  
 19 Q. (BY MR. JONES) Life. He gets -- oh, I'm  
 20 sorry. He gets life.  
 21 THE COURT: He's still guilty.  
 22 Q. (BY MR. JONES) He's still guilty --  
 23 A. Oh...  
 24 Q. -- but he gets a life sentence --  
 25 A. Okay.

1 Q. -- if you answer that question no.  
 2 A. Oh, okay.  
 3 Q. Okay. Does that make sense?  
 4 A. Yes.  
 5 Q. Okay. Then -- all right. So then -- but if  
 6 you answer the -- the jury answers the question yes,  
 7 then you proceed to Special Issue No. 2, which is --  
 8 can you see it from your chair there?  
 9 A. Yes, sir.  
 10 Q. Okay. Now, what answer to that question  
 11 will -- will cause the death penalty to occur? The  
 12 question asks for a yes or no answer. What answer  
 13 will produce the death penalty?  
 14 A. I say a yes would get you -- would get him a  
 15 life -- life in prison. A no -- let's see, a no would  
 16 get him the death penalty.  
 17 Q. You got it, you got it. You understand it.  
 18 Now, let's look at the question. If I'd been in the  
 19 legislature at the time that was written, I would have  
 20 written it different. It was not written for the  
 21 common man, but we have it and we're going to have to  
 22 deal with it.  
 23 A. Yeah.  
 24 Q. The Supreme Court says that before a person  
 25 can get the death penalty, the jury's decision has to

1 be a guided one. And the purpose of these issues is  
 2 to guide the jury, okay? So let's say this issue  
 3 tells you to take certain things into consideration.  
 4 What's the first one? "Circumstances of the offense."  
 5 Okay, well, you've already found the Defendant guilty,  
 6 so you've heard all the facts about what happened, so  
 7 you can consider that, the manner in which the offense  
 8 was committed, et cetera.  
 9 Then the next thing is "the defendant's  
 10 character and background." If I say that you, sir,  
 11 have -- are a man of good character, what does that  
 12 mean?  
 13 A. That means that, in front of you, I've  
 14 behaved in such a manner to lead you to believe that I  
 15 have good character.  
 16 Q. Okay.  
 17 A. But only in front of you.  
 18 Q. Well, but do you agree that -- that our  
 19 society has a certain basic moral code? In other  
 20 words, we have certain standards of behavior, which  
 21 everybody generally agrees are good conduct.  
 22 A. Yes, sir. Pretty much, yeah.  
 23 Q. Okay. It's bad to steal. It's -- you know,  
 24 it's -- you know, the Ten Commandments. These are --  
 25 these are moral values that we kind of generally

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1 accept as our society. They -- they go back to the  
2 beginning -- to our Judeo-Christian beginnings, okay?  
3 Do you agree?

4 A. Yes, sir.

5 Q. Now, do you agree that if a person is -- has  
6 good character -- if you say a person has good  
7 character that means that, generally, as far as you're  
8 concerned, conforms to that standard?

9 A. Yes.

10 Q. If I say you have good character, that means  
11 that I -- I think you're trustworthy, you're loyal,  
12 helpful, friendly, courteous guy, you know, the Boy  
13 Scout. In other words, you conform -- from my  
14 experience in dealing you, you have good character.

15 A. Yes, sir.

16 Q. Now, background. Well, background is your  
17 personal history, your biography, you know, where you  
18 were born, how you grew up, what schools you went to,  
19 health problems, you may have had, you know, whatever.  
20 That's -- that's easy, okay, and you would expect to  
21 hear that kind of evidence in a case like this.

22 Now, the next one's a little more  
23 difficult. "The personal moral culpability of the  
24 Defendant." What does that mean and what is that  
25 asking you to consider?

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1 A. What -- what things -- what was going through  
2 a person's mind and what kind of pressures was he  
3 under when he committed this thing.

4 Q. That's the closest in this trial that --  
5 you've come the closest to answering the question of  
6 anybody. What was going on in his mind? Now, the  
7 word, "moral" suggests, as the word, "character"  
8 suggests there's a standard out there someplace,  
9 right?

10 A. Yeah, probably.

11 Q. Okay. Probably that same general standard of  
12 moral conduct that we kind of all generally accept,  
13 would be a measure of whether a person is a good man  
14 or a bad man, right? Now "culpability" means?

15 A. Guilt.

16 Q. Guilt -- well, it means that you're subject  
17 to blame, okay? So if a person steals, he's morally  
18 culpable because he's broken one of the -- the moral  
19 codes, okay? So, when you're considering that, what  
20 was going on in his mind, what -- what value system is  
21 this guy operating under, you know, at the time that  
22 he's engaged in the conduct, how do you consider that  
23 as being -- possibly being a mitigating circumstance?

24 A. Well, like he was saying about the two  
25 robberies, you know, one of them his kids were

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1 starving at the house. And, you know, he had --

2 Q. Okay. All right. In both cases, the -- the  
3 two people were guilty of the crime, right? What was  
4 it -- I think it was burglary that he said?

5 A. It was a theft or -- yes, sir.

6 Q. Theft. Okay, one person stole because he was  
7 greedy and just wanted to get some extra money without  
8 working for it. The other guy was stealing to --  
9 they're both guilty, right?

10 A. Right.

11 Q. Of the crime.

12 A. Yeah.

13 Q. But are they both morally culpable to the  
14 same degree?

15 A. No.

16 Q. No. Why? Stealing is stealing.

17 A. Yeah. Right, but that other one had -- had  
18 different motivation involved, a lot -- a more -- more  
19 acceptable reason for doing it.

20 Q. Okay. So it's --

21 A. He had to feed his children, you know.

22 Q. Well, when the legislature sets up ranges of  
23 punishment, they not only ask the jury to find whether  
24 the Defendant is guilty of the crime, but they also  
25 ask you to decide how guilty is he, you know? In

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1 other words, what punishment are we going to give him?

2 And so, that's -- that's basically what  
3 that -- the "personal moral culpability," what was  
4 going on in his mind, what was motivating him, and...

5 Now, the example that Mr. Skurka gave  
6 you, the two guys, they're both guilty of theft. And,  
7 you know, you say, "Well, why should I give one a  
8 lesser punishment than the other?" Because there are  
9 other factors involved, are there not? And I think  
10 where you run into these factors are -- and this is  
11 where the mitigation or to lessen comes in, when you  
12 have -- when a person is confronted with competing  
13 moral values and he engages in the conduct, like the  
14 person who was stealing to -- to feed his family, he  
15 was faced with two competing moral values, right?

16 A. Yes, he was.

17 Q. What are they? What are there? One, was the  
18 duty to support his -- to feed his kids, right?

19 A. Right.

20 Q. The other one was the duty not to steal,  
21 okay? And he was faced with, "What do I do," you  
22 know? Well, he picked one, okay? And so the jury can  
23 say, "Okay. Well, that, I can -- I can understand  
24 that. We're not going to," you know, you can see how  
25 a person can get into that situation. And you -- and



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1 you give him credit for that, you know, you adjust the  
 2 punishment accordingly to reach a just result.  
 3 A. Yes.  
 4 Q. Okay. I think you understand that.  
 5 A. Pretty well, yeah.  
 6 Q. Okay. Now, do you -- let's drop down to that  
 7 last little paragraph. You understand what the word  
 8 "To mitigate" means, the verb "to mitigate."  
 9 A. That means a circumstance that's -- like a  
 10 motivation that...  
 11 Q. Let -- let me assist you.  
 12 A. Good deal.  
 13 Q. The verb "to mitigate" means to lessen.  
 14 A. To lessen?  
 15 Q. To lessen.  
 16 A. Okay.  
 17 Q. And, in the context of a criminal case, a  
 18 mitigating circumstance is one that would cause you to  
 19 want to vote for a lesser punishment. It's that  
 20 simple.  
 21 A. Yeah.  
 22 Q. The Judge will instruct the jury that they  
 23 determine what is the mitigating circumstances. If  
 24 you're on the jury, you'll be hearing all this  
 25 evidence. You can pick out any fact that's in

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1 evidence before you and choose to believe it to be a  
 2 mitigating circumstance. For example, you can  
 3 consider his age to -- for you to be a mitigating  
 4 circumstance, or the fact that he may have served in  
 5 the military to be a mitigating circumstance or  
 6 something that happened in his upbringing you can  
 7 consider. Whether he was confronted with competing  
 8 moral values when he engaged in the conduct, if he  
 9 did, et cetera, okay?  
 10 So you think you understand what the word  
 11 "To mitigate" is?  
 12 A. Yes, sir.  
 13 Q. And you -- there's virtually no limitation on  
 14 what you can -- there is no limit limitation on what  
 15 you can consider to be a mitigating circumstance if it  
 16 is in evidence, okay.  
 17 The Judge will also tell you that the  
 18 jurors don't have to agree on what is a mitigating  
 19 circumstance. You can say, "Well, I think the man's  
 20 age is a mitigating circumstance, a young fellow."  
 21 The other juror says, "I don't think so. I don't  
 22 consider it to be so." You-all don't have to agree.  
 23 Now, one other rule which we haven't  
 24 discussed is you've been told that, just generally, in  
 25 a criminal case a verdict requires a unanimous

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1 decision before the jury can announce its verdict, 12  
 2 people have to vote. But, in this case, if -- if 10  
 3 people vote yes, okay, it takes 10 votes to get a yes  
 4 or no answer; you don't have to have 12. And that  
 5 benefits the accused, does it not? In other words, it  
 6 takes a little bit less to get to a life sentence.  
 7 Okay. Ten people vote yes, then the Judge will just  
 8 follow the instruction. Doesn't require a vote of 12.  
 9 Now, I want to ask you -- let's see,  
 10 you're retired?  
 11 A. Yes.  
 12 Q. Okay. And -- and you -- one of your hobby --  
 13 or your pastimes is to write these religious tracts?  
 14 A. I just wrote one; one.  
 15 Q. You've just written one?  
 16 A. Right.  
 17 Q. Did I encounter you at the steps of the  
 18 courthouse the other day?  
 19 A. I don't -- I don't -- there's so many people  
 20 out there, I don't remember who I saw.  
 21 Q. But did you hand these out at the courthouse?  
 22 A. I did. Sure did.  
 23 Q. Have you done that in the past or was that  
 24 the first time you had done it?  
 25 A. I probably done it three or four times.

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1 Q. Okay. Do you -- is the courthouse your --  
 2 one of your places where you hand these out?  
 3 A. Just once in a while.  
 4 Q. Once in a while.  
 5 A. Uh-huh.  
 6 Q. Okay.  
 7 A. Because there's a big crowd that comes  
 8 through that door down there, believe it or not.  
 9 Q. And tell me, again, the purpose of your doing  
 10 that? You're exercising your right of free speech,  
 11 for sure, I know that, but what is your -- why do you  
 12 take the time to do that?  
 13 A. Because I think it will help people.  
 14 Q. Okay.  
 15 A. In fact, I know for a fact that it will help  
 16 them.  
 17 Q. All right. Are you familiar with the New  
 18 Testament?  
 19 A. So-so.  
 20 Q. Okay. And what prominent figure in the New  
 21 Testament got the death penalty?  
 22 A. Jesus himself.  
 23 Q. Right. You think he got a fair trial?  
 24 A. No.  
 25 Q. Okay.

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1 A. Have you ever studied that trial?

2 Q. I haven't -- I've read articles about it, and

3 there's -- but there's reams, there's books written on

4 the fairness and the manner of that trial.

5 A. I bet there has.

6 Q. Yeah, for sure. Not likely to have happened

7 in the United States. Okay. You -- is that enough?

8 MR. JONES: Okay, that's all I have.

9 THE COURT: All right.

10 MR. SKURKA: We have no other questions,

11 Judge.

12 THE COURT: Okay. Why don't you wait in

13 the -- in the jury room. I'm going to talk to the

14 lawyers and we'll call you back in a moment, okay?

15 VENIREPERSON NO. 44: Okay. Thank you,

16 folks, for your time.

17 THE COURT: Thank you.

18 MR. JONES: Thank you for your time.

19 (Venireperson exits courtroom.)

20 THE COURT: All right. Mr. Skurka, what

21 say you?

22 MR. SKURKA: Just one moment, Your Honor.

23 (Brief pause.)

24 MR. SKURKA: We'll accept the juror,

25 Judge.

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1 MR. JONES: We'll accept.

2 MR. GARZA: We'll accept, Judge.

3 THE COURT: All right. That's Juror No.

4 6. Bring him in.

5 (Venireperson enters courtroom.)

6 THE COURT: All right. Mr. Baucom, --

7 VENIREPERSON NO. 44: Yes, sir.

8 THE COURT: -- you have been selected

9 to be on this jury. So, here, I'm going to give you

10 some instructions, and I've probably already done

11 this, but I don't want you to read the local paper or

12 watch the local news for the next few weeks, okay?

13 VENIREPERSON NO. 44: Okay.

14 THE COURT: Because we just want you to

15 get the evidence that comes in in this courtroom.

16 With all due respect to the media, they don't always

17 get it right. So, we want you to get it only from

18 what comes in in this courtroom, okay?

19 VENIREPERSON NO. 44: Yes, sir. I've

20 seen some of that stuff in the media.

21 THE COURT: Yeah, I mean, they don't

22 always get it right.

23 VENIREPERSON NO. 44: Yes.

24 THE COURT: It's a fact, okay?

25 VENIREPERSON NO. 44: Yeah, I know. I

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1 agree.

2 THE COURT: Okay. Now, the other thing,

3 Mr. Baucom, this trial should start on the 1st of

4 December. It's going to at least take that week. It

5 may spill into the next week. Just letting you know.

6 We'll be keeping in touch with you about that and let

7 you know when to come back. I don't want you to talk

8 about this case with anybody, okay?

9 VENIREPERSON NO. 44: Okay.

10 THE COURT: Somebody tries to talk to you

11 about it you say, "Nuh-uh, Judge said don't -- I

12 can't talk to you about the facts of this case." When

13 the case is over with, that's something else, but

14 right now, don't talk to anybody about it, okay?

15 VENIREPERSON NO. 44: Yes, sir.

16 THE COURT: All right. We'll keep in

17 touch. So we'll see you soon.

18 VENIREPERSON NO. 44: Okay.

19 THE COURT: All right.

20 VENIREPERSON NO. 44: Thank you very

21 much. You-all have a nice day.

22 MR. SKURKA: You, too, sir.

23 (Venireperson exits courtroom.)

24 THE COURT: Okay. Do we have the next

25 person, Frank?

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1 THE BAILIFF: Yes, sir.

2 THE COURT: I mean, let's take a little

3 bit of a break and then we'll -- we'll finish with

4 this next person.

5 (Short recess.)

6 (Venireperson enters courtroom.)

7 THE COURT: This is Sammy Moser.

8

9 VENIREPERSON NO. 48,

10 SAMMY WAYNE MOSER,

11 VOIR DIRE EXAMINATION

12 BY THE COURT:

13 Q. Hold on, Mr. Moser, just a second, okay?

14 A. Okay.

15 Q. I'm sorry, Mr. Moser, I just had to get your

16 questionnaire. All right. You are Sammy Moser; is

17 that correct?

18 A. That's correct.

19 Q. Okay. Mr. Moser, you have an ill relative;

20 is that right?

21 A. My dad.

22 Q. Okay. Your dad's got cancer?

23 A. Yes, sir.

24 Q. And that may -- does he live here locally

25 or --

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1 A. He's in Oklahoma.

2 Q. He's in Oklahoma, okay. And would that -- I  
3 can tell you this trial is going to start -- I mean,  
4 obviously, we're going to take up some of your time  
5 today, and then from here it's going to start like  
6 December 1, and it's going to go for at least a week,  
7 maybe two. Is this situation with your dad getting  
8 critical or --

9 A. He's had his first chemo last week.

10 Q. Okay.

11 A. And I don't know how that goes, I --

12 Q. I'm sure he's up in age.

13 A. Yes, he is.

14 Q. Okay. Well, I guess, really and truly, what  
15 we need to know, and that's all of us, that's me,  
16 that's the Prosecution, that's the Defense, we need to  
17 know if that is going to be a distraction for you to  
18 the point where, you know, maybe sometime down the  
19 road you could be a great juror at service, or if it's  
20 not. And only you can tell us.

21 A. At this time, it's not a problem.

22 Q. Okay.

23 A. I mean, but I can't look into the future. I  
24 just --

25 Q. No, I understand that. But, I mean, are you

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1 going to be able to give us your full -- I mean,  
2 assuming that, you know, the situation doesn't --  
3 doesn't get any worse, I mean, are you going to be  
4 able to give us your full attention in this case?

5 A. Oh, yeah.

6 Q. Okay. All right. Then let's -- let's move  
7 on to the next thing, and that is, we're looking for  
8 jurors -- we're picking a jury here, obviously, you  
9 know that, and we're looking for two things and  
10 they're both important. But the first one is people  
11 that can keep an open mind, all right? That is, some  
12 people come in here and they say, "You know what, I've  
13 already made up my mind. I saw something on T.V.," or  
14 whatever, "I've already made up my mind," or, "I'm  
15 already leaning one way or the another." We don't  
16 want that, okay, because that's not really fair, all  
17 right? And I need to know if that's you.

18 A. That's not me.

19 Q. Okay. Next thing we need to talk about, what  
20 this is all about, the type of case and the law  
21 involved in it, okay? Let's see, you have served on a  
22 murder case before.

23 A. Yes, sir.

24 Q. So you're very familiar, then, with what  
25 we're doing here. "Sent to insane hospital for

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1 treatment." Do you remember the Defendant's name?

2 A. No, I don't.

3 Q. You remember the facts?

4 A. Barely. This was many years ago.

5 Q. Yeah.

6 A. It was a young man that was very -- it was  
7 very obvious he had some mental problems.

8 Q. Uh-huh.

9 A. And he had killed his mother with a shotgun.

10 Q. Oh, okay. Well, then, you know a lot of the  
11 concepts we're going to go through, like it's the  
12 State's burden of proof, okay? Do you agree with  
13 that?

14 A. Uh-huh.

15 Q. Could you hold the State to their burden of  
16 proof? I mean, you've done this before, but -- but  
17 you could do this; correct?

18 A. Yes.

19 Q. Okay. So you have more experience than most  
20 folks that we have coming in here so I'm going to go  
21 through some of these concepts a little quicker. And  
22 you -- you stop me if it -- if I get too far ahead of  
23 you, but it's their burden of proof. The law says,  
24 "Look, State, you brought the charges, you've got to  
25 prove them, okay? You don't just get to say somebody

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1 did it and it's true and then they have to prove  
2 they're innocent." We don't do it that way in this  
3 country, okay.

4 You don't have a problem holding them to  
5 their burden of proof?

6 A. No, I don't.

7 Q. Okay. And then, of course, the burden of  
8 proof -- and you know this from your prior service --  
9 is beyond a reasonable doubt, okay?

10 A. (Nodding head.)

11 Q. And -- and you're nodding. And, you know, of  
12 course, this isn't beyond all doubt or beyond a shadow  
13 of a doubt, it's beyond a reasonable doubt. It's the  
14 highest the standard that we have in criminal law.  
15 Could you hold the State to that burden?

16 A. Yes.

17 Q. Okay. Now, as part of our system, says,  
18 "Look, State, you bring the charges, you prove them,  
19 but, as part of that, until you prove anything against  
20 anybody, they're innocent until proven guilty."

21 A. Yes.

22 Q. Okay? That is, "All right, you bring  
23 charges, but, you know, you haven't told us anything.  
24 You don't -- you don't just get to say, 'Hey, that  
25 guy's guilty and it's so, you got to prove it,'" okay?

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1 It's part of that innocent until proven. You believe  
2 in innocence until proven guilty?

3 A. Yes.

4 Q. And you could follow that law?

5 A. Yes.

6 Q. That is, if this man here that's charged in  
7 this case is innocent, and you could -- you could  
8 believe him to be innocent until the State proves  
9 otherwise?

10 A. That's right.

11 Q. Okay. Now, as part of that, the law says,  
12 "Look, if he's innocent until proven guilty, if the  
13 State's got the burden of proof, if the burden never  
14 shifts over here, then Defense doesn't have to do  
15 anything. They don't have to present any witnesses.  
16 They don't have to present any evidence."

17 They might. They might not. As part of  
18 that, Defendant doesn't have to testify. Constitution  
19 says that. Bill of Rights. Okay? And it really  
20 makes sense because if they've got the burden of proof  
21 then they don't have to do anything.

22 You know, I submit there's a lot of  
23 reasons why a defendant wouldn't want to testify.  
24 Maybe his lawyers told him, "Don't testify. They  
25 haven't proven their case." Maybe -- you know, not

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1 all people are good speakers, you know? Maybe --  
2 maybe he gets stressed out and stutters when he gets  
3 stressed out. Maybe he's just not a good speaker, you  
4 know.

5 But the question really is, some people  
6 say, "You know, I'll hold it against him." Okay? Law  
7 says you can't. Law says, "Look, you cannot -- State,  
8 you cannot call him as a witness," But it goes even  
9 further than that. Factfinder, whether it's, you  
10 know, the jury or in some cases the Court, says,  
11 "Look, factfinder, you can't hold it against him,  
12 okay?" You can't say, "State, all right, I hear your  
13 evidence. Defense -- Defense doesn't present anything  
14 so you know what, I'm going to put a star over here.  
15 It's a little bit more. I'm going to tip the scales a  
16 little bit more because he didn't testify and I want  
17 to hear both sides of the story."

18 I need to know if you can follow the law  
19 and not hold it against him if he chose not to  
20 testify?

21 A. I can.

22 Q. Okay. All right. Now, you -- you've sat on  
23 a murder case before and I -- I assume it was a -- you  
24 know, quote, unquote, plain murder, standard murder.

25 A. (Nods head).

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1 Q. Okay. And in the case you had -- well, see,  
2 you -- you know all about the bifurcated system, that  
3 is, the case begins, guilt or innocence phase. You --  
4 you sat on that, and you -- you wait and listen to all  
5 the evidence, and then at the end of the case -- and  
6 you know the process, you decide whether the State's  
7 proven their case beyond a reasonable doubt; correct?

8 A. Correct.

9 Q. And you've done that. You understand that.

10 A. I do.

11 Q. And then in your -- in that case, in the  
12 murder case, the punishment range is 5 years to 99  
13 years or life, and, in some cases probation is a  
14 possibility. Says -- I see from your questionnaire  
15 that -- that the jury did assess punishment. And, as  
16 you recall, the jury came up with a number, right?

17 A. Yes.

18 Q. Okay. So the jury comes up with a -- they go  
19 back there and they deliberate, again, and they come  
20 up with a punishment based upon what the law  
21 prescribes as the punishment range.

22 A. Yes.

23 Q. Okay. Capital murder is not like that, it's  
24 a little different, okay? Capital murder, there's two  
25 options: Life imprisonment or death. Only two

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1 options if the Defendant's found guilty of capital  
2 murder, okay? But you don't say life or death, you  
3 answer these questions. And we've got one up here.

4 If -- if a -- if the Defendant is found  
5 guilty of capital murder, jury would then go to the  
6 second phase, the punishment, and they'd -- if you'll  
7 turn around here, they'd answer this question: "Is  
8 there a probability that the Defendant would commit  
9 criminal acts of violence that would constitute a  
10 continuing threat to society," and the jury would  
11 answer yes or no, okay?

12 Then on -- then you'd answer Special  
13 Issue No. 2. "After taking into consideration all of  
14 the evidence, including the circumstances of the  
15 offense," that's your guilt and innocence phase stuff,  
16 "And the Defendant's character and background and the  
17 personal moral culpability of the Defendant, is there  
18 a sufficient mitigating circumstance or circumstances  
19 to warrant that a sentence of life imprisonment,  
20 rather than a death sentence be imposed?" Okay? And  
21 the jury would answer yes or no to that.

22 And that's basically everything that you  
23 hear in the case. Okay? Maybe you hear good stuff  
24 about the Defendant, maybe not. Maybe you hear the  
25 facts of the case in the first part, and then you hear



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1 a bunch of good stuff or maybe you hear a bunch of bad  
2 stuff or maybe it's a mixed bag, okay, about his  
3 background, what kind of guy he is, okay?

4 A. Yes.

5 Q. And then you'd answer that question. All  
6 right? Okay. Now, do you think you could answer  
7 these two questions?

8 A. Yes.

9 Q. Okay. Now, what is capital murder? Well,  
10 you know what murder is. Murder is the intentional  
11 taking of the life of another. Capital murder is like  
12 murder plus. Okay? The legislature has said there  
13 are certain murders, and because of the facts and  
14 circumstances they become capital. And what's  
15 capital? Capital means the death penalty is a  
16 possibility.

17 In this case, the State has alleged  
18 murder while in the course of committing or attempting  
19 to commit a robbery, okay? So we have -- and then  
20 they're together, murder plus robbery or attempted  
21 robbery. They don't just get to prove one or the  
22 other. Okay? They may be guilty of one or the other,  
23 but unless they prove the whole thing together, they  
24 don't get capital murder in this case. You understand  
25 that?

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1 A. I understand that.

2 Q. Okay. And that -- and, of course, what's  
3 robbery? Well, that's the -- you know what robbery  
4 is, right? That's the forceable taking of something  
5 or threatening to take something from somebody else by  
6 force, okay?

7 A. Yes.

8 Q. All right. So, they have to do it all.

9 Now, the law says that the State has to  
10 prove all of the elements of capital murder to get a  
11 conviction. And I don't know how many there are.  
12 There's about seven, eight, nine, something like that.  
13 They got to prove all of them. They don't get to just  
14 get pretty close. They don't get eight out of nine or  
15 seven out of eight to get there. The law says you got  
16 to prove them all, okay?

17 Could you -- could you hold the State to  
18 that burden, --

19 A. Yes.

20 Q. -- to prove them all? All right.

21 Now, I mean, at the beginning of the case  
22 -- and I'm sure you remember this from your prior  
23 service -- you take an oath, right?

24 A. Yes.

25 Q. Each of the jurors raise their right hand and

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1 they take an oath to render a true verdict based upon  
2 the law and the evidence presented to you. Okay. And  
3 the jury says yes, and then we begin. I need to know,  
4 can you take that oath to sit as a juror and listen to  
5 the evidence and render a true verdict on guilt or  
6 innocence on the guilt or innocence phase of this  
7 trial?

8 A. Yes.

9 Q. Okay. Now, the next thing. If -- if  
10 Defendant is found guilty tea of capital murder by the  
11 jury then we go to the second phase. The next  
12 question, of course, is can you -- can you answer  
13 these questions? And before you answer that, I want  
14 to tell you that some people say, "Look, I could sit  
15 as a juror on the guilt or innocence phase, but when I  
16 got to the punishment, I could not answer questions  
17 that could lead to someone's death," or some people  
18 tell me, "Look, they find -- if we can find him guilty  
19 of capital murder, I don't care about the law and all  
20 this stuff. I'm just going to -- it's going to be  
21 death for me. I'm not going to consider any of this  
22 stuff. That may be the law, but that's not -- I'm not  
23 going to apply it or follow it."

24 I need to know that you could take the  
25 oath, not only to -- now, you've already told me on

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1 the guilt or innocence phase to render a true verdict  
2 based upon the law and evidence, but could you  
3 truthfully answer these two questions if called to do  
4 so?

5 A. Yes.

6 THE COURT: Okay. All right. I'll turn  
7 the floor over to Mr. Skurka.

8 MR. SKURKA: Thank you, Judge.

9 VOIR DIRE EXAMINATION

10 BY MR. SKURKA:

11 Q. Hi, Mr. Moser. My name is Mark Skurka. I'm  
12 the first assistant district attorney. This is  
13 Geordie Schimmel. He's also an assistant district  
14 attorney that works and is assigned to Judge Galvan's  
15 Court. And, together, we'll be presenting this case  
16 to you if you're selected on this jury.

17 I want to the start off by telling you  
18 there's no right or wrong answers to anything you say.  
19 We just want to hear what you truly feel about some of  
20 these issues or laws that we're going to talk about  
21 this. Now, the reason that this is such an important  
22 case, of course, is because John Henry Ramirez, over  
23 here, the Defendant, could be facing the death  
24 penalty.

25 A couple of things that we need to start

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1 off with. When I say, "could be facing," that's  
2 because he's got to be found guilty first and right  
3 now he's presumed innocent. Do you agree with that?

4 A. I agree with that.

5 Q. In other words, the State has to prove the  
6 case beyond a reasonable doubt. And that's in this  
7 case and in every criminal case, whether it be  
8 shoplifting or D.W.I. Do you believe that concept of  
9 law?

10 A. I do.

11 Q. The law also says that death penalty is not  
12 automatic. Sometimes people tell me -- and I don't  
13 know if you knew this before but a lot of times people  
14 have told us, "Well, I thought every murder case is  
15 eligible for the death penalty." And we have to tell  
16 them, "No, only certain cases that the legislature has  
17 set out to be capital murder cases." And I know the  
18 Judge says, "plain murder," we say, "plain murder."  
19 It's not really plain, but what capital murder is,  
20 it's got to be kind of an elevated-type of murder,  
21 murder plus something else.

22 In other words, like, you know, killing  
23 somebody while you're robbing, raping, kidnapping  
24 them, burglarizing them, you know, killing a kid under  
25 six, killing a cop on duty, that type of stuff. Only

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1 those are even qualified to be a death penalty case.

2 So that's why the charges are brought  
3 against him, is because we're alleging, the State is  
4 alleging that he committed murder while in the course  
5 of committing robbery, and "robbery" meaning taking  
6 something by force or by threats of force. It doesn't  
7 even have to be a completed robbery. In other words,  
8 you could be doing the robbery and kill somebody and  
9 it could be capital murder. So, it's got to kind of  
10 be both of those things.

11 When we talk about the death penalty,  
12 some people propose this, "Well, I believe in the  
13 death penalty. I think it's a good law. I think it's  
14 good and everything, but, please, don't make me part  
15 -- to make that decision." Now, you probably agree  
16 with me, it's an awesome responsibility if you get  
17 called upon to be on this on this jury, correct?

18 A. Yes, sir.

19 Q. How do you feel about being on that type of a  
20 jury?

21 A. Well, I've never spent a lot of time, other  
22 than my belief system. I just -- I believe that if  
23 you commit a crime, you should pay for it.

24 Q. Okay. And the law says -- and I know that  
25 some people say, "Well, it's an eye for an eye. If

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1 you murder somebody, you must automatically be killed  
2 yourself." But the law in Texas is essentially this:  
3 There's two choices, death or life in prison.  
4 Sometimes people who get convicted of capital murder  
5 get the death sentence after they hear all the  
6 circumstances. Sometimes people who are convicted of  
7 capital murder get a life sentence, depending on the  
8 circumstances and background.

9 Do you agree with that scheme, that it  
10 should be one or two of those things?

11 A. I do.

12 Q. In other words, it's not always going to be  
13 capital murder, to where you're convicted and get the  
14 death penalty, there's a chance you might get a life  
15 sentence, depending on what a person's background and  
16 history is, correct?

17 A. Correct.

18 Q. Do you believe that?

19 A. I do.

20 Q. So you can consider both life in sentence or  
21 the death penalty equally?

22 A. Yes.

23 Q. You know, and I'm -- and I should have said  
24 "Based on the circumstances."

25 A. Well, that was the key word.

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1 Q. I -- I almost left it out, but I got it in  
2 there. And -- and that's what the law says. The law  
3 and the Judge, in order to see if you qualify, has to  
4 make sure that you're open-minded, that you're not  
5 going to say, "Well, I'm automatically going to say  
6 he's guilty just because he's sitting there." Are you  
7 going to do that?

8 A. No.

9 Q. The Judge is also going to want to know if  
10 you're automatically going to give him the death  
11 penalty just because he's found guilty. Are you going  
12 to wait till you hear everything and then decide  
13 should he get the death penalty or should he get a  
14 life sentence?

15 A. I'm going to refer back to the circumstances  
16 and at the end of the arguments.

17 Q. Sure. The circumstances and the evidence.  
18 Because right now you have no idea of his background,  
19 if he was a good boy, was he a bad boy; he's been to  
20 prison 20 times before, has he never been to prison,  
21 you know, any of that kind of stuff. All we have to  
22 do is make sure that you're equal and you can listen  
23 to both -- everything and decide what's the proper  
24 punishment. Can you do that?

25 A. Yes.

1 Q. How do you feel about having to make that  
2 decision, though? I mean, some people -- this is why  
3 I say that. Some people that first day, you know, we  
4 had those 2- or 300 people in there, and the Judge  
5 came down and says, "Okay, folks, this is a criminal  
6 case and that man over there is facing -- could be  
7 facing the death penalty," what -- what struck your  
8 mind when you heard it was that kind of case?

9 A. Well, when someone's life is at stake, you --  
10 that's not an easy thing to -- I mean, that's always a  
11 problem.

12 Q. Okay.

13 A. But you -- I'm a citizen of this United  
14 States and we have to protect each other. And I think  
15 that's the way we do it, is we -- we have a good court  
16 system.

17 Q. That's a good answer because that's the way  
18 it should be, right?

19 A. Yes.

20 Q. In other words, you have laws to protect  
21 society, correct? If somebody breaks those laws, they  
22 have to face the consequences. But, on the other  
23 hand, it's not something that -- that -- a fun thing  
24 to do, sitting on a jury like that, or something that  
25 you're happy about doing. It's almost one of those

1 things like, "Hey, I wish I didn't have to sit on a  
2 jury, but if I'm called to do my civic duty, I'm going  
3 to be do my civic duty." Is that kind of where you  
4 fit in?

5 A. Yes.

6 Q. And it's probably important, too, that all  
7 that power doesn't rest with one person. In other  
8 words, Judge Galvan, he's a judge, but he can't  
9 sentence somebody to death. The district attorney,  
10 Carlos Valdez, can't say, "Oh, I'm going to sentence  
11 this guy to death." The people have that power with  
12 the jury. So it doesn't matter how mad the Judge is  
13 at somebody, or the D.A. is mad at somebody, only 12  
14 people, citizens like you, can make that decision.

15 A. I'm glad.

16 Q. Fair system to you?

17 A. I'm glad it's that way.

18 Q. And it should be that way, right? We don't  
19 want to have a dictator telling us what to do and how  
20 to do that. But make no mistake about it, there's  
21 going to be a time, I've told you-all that the very  
22 first day, the State is going to seek the death  
23 penalty and there's going to be a time I'm going to  
24 stand in front of this jury, and say, "Based on the  
25 evidence, based on the circumstances, I'm going to ask

1 you to answer the questions in such a way that that  
2 man right there is executed."

3 Can you do that if the evidence calls for  
4 it?

5 A. If the evidence shows that.

6 Q. Okay. I'm going to tell you -- ask you to do  
7 another thing. If the evidence shows that he should  
8 get a life sentence, can you vote for a life sentence,  
9 too?

10 A. Yes.

11 Q. Okay. So it doesn't matter. You're going to  
12 go with whatever the evidence says, right?

13 A. Whatever the evidence says.

14 Q. That's fair enough. Now, let me tell you,  
15 we've talked about why it's murder, let me talk about  
16 -- or capital murder, let's talk about what happens in  
17 the scheme of things different from the other trial  
18 you were on and other cases. Generally speaking, a  
19 jury finds -- there's two parts, guilt or innocence,  
20 and the punishment phase.

21 Generally speaking, in the guilt or  
22 innocence phase, you hear just what happened that day,  
23 you know, what -- what happened at the crime, what he  
24 did, what he didn't do, did he do it, you know, is he  
25 guilty or not?

1 The second part of the trial you might  
2 get to hear additional evidence. Instead of just that  
3 day, you might want to hear about his background.  
4 Well, this guy's been to prison 20 times before, or  
5 this guy was an Eagle Scout and made good grades in  
6 school, was in honor roll, you know? See what I'm  
7 saying? You might want to hear some more background  
8 to make a decision.

9 Probably in your case before you got to  
10 hear about his medical background or psychiatric  
11 background before you can make a decision. You didn't  
12 make a decision on his punishment just by the case,  
13 you'd make it on all the background.

14 Now, in Texas what we do is -- we call it  
15 "The punishment phase," but in the capital murder  
16 case, we don't just vote death or life and check off  
17 one or the other. You answer these two questions  
18 based on everything. And they're behind you on the  
19 board, and let's look at the first one. It says, "Is  
20 there a probability that the Defendant would commit  
21 criminal acts of violence that would constitute a  
22 continuing threat to society?" In other words, is he  
23 -- is he going to be a danger in the future to  
24 society?

25 In that question, some of the key words I

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1 want you to look at is it says, "Is is there a  
2 probability?" It doesn't say it's a certainty. I  
3 mean, there's no way I could prove to you for sure  
4 what's going to happen in the future, and the law  
5 doesn't require me to. It just says, "Is there a  
6 probability," is it more likely than not like that  
7 he's going to do these things?  
8 It also says you don't even have to wait  
9 and see -- wait and see if he's going to murder again.  
10 It just says, "criminal acts of violence." Some  
11 people say, "Well, do I think he's going to murder  
12 again or commit another capital murder?" It doesn't  
13 require that level. It just says, "criminal acts of  
14 violence."

15 And the last phrase says, "a continuing  
16 threat to society." You've probably heard that  
17 before, right?

18 A. Yes.

19 Q. Sometimes people come up to me and say,"  
20 "Well, why is the State seeking a death penalty? Why  
21 do you have to have a death penalty? Why don't you  
22 just give him a life sentence and lock him up in  
23 prison, then he'd be away from society." And I always  
24 say, "Well, wait a minute, what else is -- who else is  
25 in a prison?" There's other inmates, there's guards,

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1 there's people that work in the prison, like clerical  
2 people, the warden and his staff, things like that.  
3 So if you really put somebody in prison, does that  
4 mean he can't hurt somebody else again?

5 A. No.

6 Q. No. And you've probably heard of that  
7 happening before, right?

8 A. Yes.

9 Q. So, we don't of this system where you're put  
10 on a desert island and you'll never see another human  
11 being so you can't hurt anybody. So would you agree  
12 with me that prison can still be considered part of  
13 society, right?

14 A. Yes.

15 Q. Okay. So the first question, based on all  
16 the evidence, both the circumstances of the crime and  
17 the surrounding circumstances and maybe his  
18 background, you would have to decide is guy going to  
19 be a danger in the future, is he capable of hurting  
20 somebody in the future, yes or no?

21 A. (Nods head.)

22 Q. Then you go to the second question. The  
23 second question is what we call "the mitigating  
24 circumstances question." And, essentially, what that  
25 says is, mitigating is a big word that basically means

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1 "anything that would lessen or make less severe the  
2 punishment."

3 In other words, he did the crime, but is  
4 there any reason, is it a sufficient reason to lower  
5 the sentence to life, instead of death? Is there,  
6 like -- some people call it different things, like  
7 "extenuating circumstances" or "reasons," or something  
8 like that. And mitigating circumstances just  
9 basically means anything that reduces the defendant's  
10 moral blameworthiness, anything that would lessen or  
11 make less severe the punishment.

12 In other words, is there any reason to  
13 cut him a break and give him a life sentence instead  
14 of death? Let me give you an example. Two burglars.  
15 You have two burglary cases that are completely  
16 separate, and you're called to sit and decide the  
17 punishment of these people. They're both guilty of  
18 burglary. That means they went into somebody's house  
19 and stole something without permission.

20 The first burglar, you find out the facts  
21 of that case are he kicked in the door, broke down the  
22 door, ransacked the whole house, stole all the money,  
23 jewelry, T.V., V.C.R.s, everything of value. And then  
24 you also hear about his background is this is not his  
25 first burglary. He's been into the prison three times

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1 before for burglary, stop.

2 Go to the second guy. The second  
3 guy is also guilty of burglary. What he did was go  
4 into somebody's house and take something without  
5 permission but the circumstances are a little  
6 different. He didn't kick down a door or break a  
7 window to get in. The back door was unlocked so he  
8 opened it and went in the kitchen. He didn't go into  
9 the house, even though the house had jewelry, money,  
10 T.V., V.C.R. and stereos, he didn't go take any of  
11 that stuff. He took a loaf of bread and some food  
12 because he lost his job and his kids were hungry and  
13 he needed to feed his family.

14 And you find about his background, and,  
15 lo and behold, he's never even been arrested before.  
16 This is the first time he's ever gotten charged with a  
17 crime. He hasn't been to prison three times before.

18 So looking at those two widely separate  
19 things, they're both guilty of burglary, right? It's  
20 still wrong to go into somebody's house and take  
21 something, but would you treat those guys exactly the  
22 same?

23 A. No.

24 Q. Of course not. What would you do? The first  
25 one has aggravating circumstances and you'd probably



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1 make the sentence go up; the second one has mitigating  
2 circumstances and it would go down. It's very hard to  
3 say what a mitigating circumstance is but you can see,  
4 and the second part is, he didn't break in and didn't  
5 destroy property. All he stole was food. He didn't  
6 take anything else. He didn't even have a record. So  
7 you'd probably treat that guy lesser than the other  
8 guy.

9 And that's what that question is all  
10 about. Is there a reason to go to a lesser sentence  
11 of life instead of death? Is there enough reason to  
12 go? Is it sufficient?

13 Now, what is a mitigating circumstances  
14 is up to the jury to decide. You can't -- the Judge  
15 is not going to tell you, "This is a mitigating  
16 circumstance, this is a --" it's up to the jury, and  
17 it's just not defined that way. The point you have to  
18 do to be qualified on this jury is you have to listen  
19 to all the evidence and the circumstances and see if  
20 there's anything that would make you lower the  
21 sentence. For example -- but it's up to the jury.

22 Some people may say, "Well, yeah, he was  
23 an Eagle Scout or he was on the honor roll in school.  
24 but that was years ago and he's still got to pay for  
25 what he did in this crime." Other people may say,

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1 "Well, look, you know, he's not all bad. He -- he was  
2 an Eagle Scout, he was on the honor roll, so maybe we  
3 should cut him a break and give him something less."  
4 See what I'm saying?

5 A. Uh-huh.

6 Q. It's the same evidence but different people  
7 treat it different way. And the question is, you have  
8 to do that balancing test and say "Is it enough, you  
9 know? Sure he did some good things back in his life.  
10 Sure he helped his mother. Sure he was a good kid in  
11 school, but does it outweigh what he did in this  
12 crime"? See what I'm saying?

13 A. Yes.

14 Q. So essentially what's happening is, you found  
15 the guy guilty of capital murder. You've answered the  
16 Special Issue No. 1 yes, "Yes, I think he's a  
17 continuing threat to society," but before you impose  
18 the death penalty, the Judge gives you this question  
19 and he says, "Stop and wait. Look at -- take into  
20 consideration all of the evidence, look at the big  
21 picture, including the circumstances of the offense,"  
22 you know, that -- the crime itself, how heinous was  
23 it, how bad it was, whatever, "the defendant's  
24 character and his background," does he have good  
25 character or bad character, does he have a good

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1 background or bad background, "and his personal moral  
2 culpability, is there sufficient --" is there enough  
3 circumstances or mitigating circumstances to warrant  
4 that you life -- sentence to life, instead of a death  
5 penalty?

6 It's -- I like to tell people it's like a  
7 checks and balances system. It looks like he's  
8 heading toward the death penalty, but the jury is  
9 asked to look at everything else just to make sure  
10 that there's nothing that would lower the sentence.  
11 If there is something, you should lower it to a life  
12 sentence. If it's enough, that's what the law says,  
13 lower it to a life sentence. But if there's not  
14 enough, if it's not sufficient enough, you would  
15 answer that question no.

16 So if you answer the first question yes,  
17 he's a continuing threat to society, and no, there's  
18 no reason to lower the sentence, he gets a death  
19 sentence. If you answer it any other way he gets life  
20 in prison. Does that make sense to you?

21 A. Yes.

22 Q. It's -- it's kind of a careful consideration  
23 for the jurors. It's like you said earlier, you know,  
24 nobody wants to do this but they got to do their civic  
25 duty, and I think the Judge is telling you, "Hey, look

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1 at everything. It's a tough decision. It's a big  
2 decision. See if there's any reason to lower it. If  
3 there's not, there's not, and you do your duty. If  
4 there is, there is and you do your duty." Okay.

5 So you open-minded to listen about maybe  
6 background stuff, information.

7 A. Yes.

8 Q. He may put on evidence, he may not. I don't  
9 -- I don't know, but you have to be able to consider  
10 everything before you make that decision, okay? But  
11 it's up to the jury.

12 One law that the Judge may tell you, too,  
13 is voluntary intoxication is not a defense to crime.  
14 "Voluntary intoxication." In other words, if you go  
15 get yourself drunk or high on drugs and you go commit  
16 a crime, can you say that's an excuse for the crime?  
17 No. The law says no. You can't go rob a bank and  
18 say, "Well, I'm not guilty because I was drunk, you  
19 know, when I robbed that bank" No, can't do that.

20 But the Judge may say that that's a  
21 possible mitigating circumstance. You can't consider  
22 it as an excuse of crime, but maybe that's a reason to  
23 go lesser on the sentence. Maybe it is. Maybe it  
24 isn't. Maybe some people say, "Well, I don't care if  
25 he was drunk or not. He still did the crime." Some

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1 people say, "Well, he was drunk. Let's give him a  
 2 break." See what I'm saying?  
 3 A. Uh-huh.  
 4 Q. So that's one of the laws. Do you have any  
 5 question about any of the -- the special issues that  
 6 we talked about?  
 7 A. No.  
 8 Q. Does that -- does that kind of make sense to  
 9 you, the way it kind of follows down the line?  
 10 A. It's pretty clear.  
 11 Q. Okay. So the bottom line is you'll be  
 12 open-minded. You haven't decided you're going to give  
 13 a death sentence or a life sentence, right?  
 14 A. No.  
 15 Q. You'll wait --  
 16 A. No.  
 17 Q. -- till you hear everything. I know that  
 18 sounds silly, but I have to ask, and make sure you're  
 19 not leaning one way or the other.  
 20 And you understand that being charged  
 21 with the case doesn't mean he's guilty. Just because  
 22 he's been indicted by the grand jury doesn't  
 23 necessarily mean he's guilty of the crime. He's  
 24 presumed innocent. You believe in that?  
 25 A. Yes.

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1 Q. And the Fifth Amendment. He may testify, he  
 2 may not. But if he doesn't testify, the Judge is  
 3 going to tell you you can't hold that against him. Do  
 4 you believe that?  
 5 A. Yes.  
 6 Q. Okay.  
 7 A. I have a question now.  
 8 Q. Sure.  
 9 A. The Defense doesn't have to testify.  
 10 Q. Right.  
 11 A. Or give evidence. It's all left to you.  
 12 Q. Correct. That's my burden in this criminal  
 13 case and in every criminal case, whether I'm trying a  
 14 D.W.I. or shoplifting case. Because America has set  
 15 it up that you're not considered guilty and you have  
 16 to prove your innocence, the State has to prove he's  
 17 guilty beyond a reasonable doubt. The Defendant  
 18 doesn't have to put on any testimony. They don't have  
 19 to put on any witnesses at all. The Defendant doesn't  
 20 have to testify if he doesn't want to. And under our  
 21 system he's allowed that right and you can't hold it  
 22 against him.  
 23 It's like the Judge said very early on,  
 24 you know, "If the State is going to bring charges, the  
 25 State has got to prove the charges," okay? I mean, if

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1 you were, God forbid, charged with a crime, why should  
 2 you have to prove that you were not guilty? I mean,  
 3 the State has to prove you're guilty if they're  
 4 bringing those allegations. Okay? Does that answer  
 5 your question?  
 6 A. Yes.  
 7 Q. And beyond a reasonable doubt basically means  
 8 -- it doesn't means beyond all doubt, beyond any  
 9 doubt. It just means beyond a reasonable doubt. In  
 10 other words, there's no way I can prove this to you,  
 11 you know, 100 percent, and the -- and the law doesn't  
 12 require me to. It just says prove it beyond a  
 13 reasonable doubt.  
 14 So you can consider life, if the verdict  
 15 -- I'm sorry, if the evidence points that way;  
 16 correct?  
 17 A. Yes.  
 18 Q. And you can consider death if the evidence  
 19 points that way; correct?  
 20 A. Yes.  
 21 Q. Do you have any questions about anything  
 22 we've talked about?  
 23 A. Not so far.  
 24 MR. SKURKA: Okay. I think that's all  
 25 the questions I have of you, Mr. Moser. I'll let the

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1 Defense lawyers talk to you now. Thank you, sir, for  
 2 your attention.  
 3 MR. GARZA: May I proceed, Your Honor?  
 4 THE COURT: Yes.  
 5 VOIR DIRE EXAMINATION  
 6 BY MR. GARZA:  
 7 Q. Good afternoon, Mr. Moser.  
 8 A. Good afternoon.  
 9 Q. I'm Ed Garza. I think I introduced myself to  
 10 you and the rest of the panel when we converged  
 11 downstairs a few weeks ago to fill out these  
 12 questionnaires. And this is Mr. Jones sitting next to  
 13 me. He is my Co-Counsel in this matter. And our  
 14 client, Mr. John Henry Ramirez. Okay?  
 15 What did you think about this  
 16 questionnaire when you started reading through it and  
 17 filling it out?  
 18 A. It's very extensive.  
 19 Q. Asks a lot of questions, doesn't it?  
 20 A. Yes, it does.  
 21 Q. We're --  
 22 A. Not quite sure how to fill each one out. I  
 23 mean, it's -- you do your best.  
 24 Q. Okay. Personally, I know it's something  
 25 maybe you don't talk about on a daily basis, but what

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1 is your attitude toward the death penalty?  
 2 A. My attitude toward the death penalty?  
 3 Q. Yes, sir.  
 4 A. I -- you may not like my answer.  
 5 Q. Like we said, we have -- there is no wrong or  
 6 right answers --  
 7 A. Okay.  
 8 Q. -- and that's why -- it's kind of -- Mr.  
 9 Skurka asked a lot of questions and I heard you say,  
 10 yes and no, and yes and no, and yes and no, but I  
 11 never heard --  
 12 A. If you read my paper --  
 13 Q. Yes.  
 14 A. -- I -- I grew up in the church.  
 15 Q. From what I can tell, you're a deacon at your  
 16 church, are you not?  
 17 A. Yes.  
 18 Q. Yes, sir.  
 19 A. And I -- I have a great understanding of  
 20 God's Word, and I'm -- and I believe, from what I read  
 21 in the Scripture, that God is the author of -- of  
 22 punishment phases, and I base my decisions on what He  
 23 has given in His Scripture. So, I -- if you take  
 24 someone's life, you got to answer for it.  
 25 Q. Yes, sir. So according to some of the

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1 Scripture, of course, there's the proverbial "Eye for  
 2 and eye."  
 3 A. I think I put that in my deal.  
 4 Q. Yeah. Now, do you -- do you believe that  
 5 there is a big difference, which obviously there is,  
 6 between God's Law and man-made law?  
 7 A. No, because I think our Constitution was  
 8 based on that. And our laws are -- our laws are, I  
 9 think, fair.  
 10 Q. Okay.  
 11 A. And if we didn't have that -- God gave us  
 12 that Constitution, I'm convinced of that, so -- and we  
 13 have people that are much smarter than I am that put  
 14 those together. And I think it's a very fair system.  
 15 Q. Okay. You answered that in your  
 16 questionnaire when you were asked, "Do you think the  
 17 death penalty is applied fairly," you indicated, "No."  
 18 And your explanation was that, "Some cases that are  
 19 proven wrong through D.N.A. testing."  
 20 A. We have a lot of people, I feel, that was --  
 21 went through cases, and -- and I don't know why  
 22 they're -- it could have been jury, it could have been  
 23 evidence, but now they're free based on D.N.A.  
 24 evidence. Would you not agree?  
 25 A. Yes. I'm -- we're -- we're big proponents of

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1 that. These are people that have been actually --  
 2 have factually found innocence, you know, for a lot of  
 3 reasons, they --  
 4 A. They didn't get there by accident, it was by  
 5 evidence that -- wrong evidence, I -- I feel.  
 6 Q. Sometimes, would you believe, it was -- I  
 7 mean, if you -- if you've read some of these articles,  
 8 there's a -- there's a leading article in this month's  
 9 issue of Texas Monthly where there's several people  
 10 whose stories have sort of been brought out about  
 11 their wrongful convictions, okay --  
 12 A. Uh-huh.  
 13 Q. -- and how they served 15, 20, you know,  
 14 some-odd years in prison until finally they were  
 15 exonerated.  
 16 A. I think that's great.  
 17 Q. You know? And -- and thank God, at least,  
 18 they were -- they're among the living. There are  
 19 people that lived through the ordeal, okay?  
 20 A. Yes. And I -- but I -- you know, I'm not  
 21 holding anyone responsible. All of us make mistakes,  
 22 even prosecutors.  
 23 Q. Sure. Even defense lawyers.  
 24 A. Yes.  
 25 Q. We're certainly not perfect. But this is the

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1 kind of case that is so serious that we have to put  
 2 forth an enormous amount of -- of skill, knowledge,  
 3 experience, fairness, to hope, to hope that we get it  
 4 right.  
 5 A. Yes.  
 6 Q. Do you agree with that, sir?  
 7 A. I agree with that.  
 8 Q. Because if we don't, and like you've stated  
 9 here, something does go wrong and we unjustly or -- or  
 10 wrongfully, you know, convict this man, and he is  
 11 sentenced to a death sentence of some sort, before  
 12 anything else happens and he gets executed, God  
 13 forbid, and we find out later on that we didn't get it  
 14 right, how would that make you feel?  
 15 A. Make me feel bad, just like it does for all  
 16 of those men that were unjustly. But our court system  
 17 is still the greatest in the world.  
 18 Q. I agree with you. I agree with you.  
 19 A. Even though there is injustice.  
 20 Q. Yes, sir. Do you understand the concept of  
 21 the presumption of innocence? I think you do.  
 22 A. Yes, I do.  
 23 Q. Right now, if I asked you to render a  
 24 verdict, what would your verdict be?  
 25 A. It would not -- I have no -- I do not know

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1 the man. I've heard nothing about him.

2 Q. Okay. Then you don't understand the  
3 presumption of innocence.

4 A. Well, he's innocent until proven guilty.

5 Q. So, right now, if I asked you to render a  
6 verdict, what would your verdict be?

7 A. It would be innocent.

8 Q. Right. Okay. All right, I just want to make  
9 sure you do understand it.

10 A. Oh, yeah.

11 Q. Okay. Reasonable doubt. What does that mean  
12 to you?

13 A. Reason -- if it -- if I -- if there's  
14 something in evidence that just doesn't add up, I have  
15 to take that into consideration.

16 Q. Some sort of doubt based on reason.

17 A. Uh-huh.

18 Q. Is about as easy as I can try to define it  
19 because there really is no definition, you have to use  
20 your common sense. And the burden of proof -- I  
21 noticed that you asked Mr. Skurka, and you wanted to  
22 ask him a question about are -- you know, do you have  
23 to prove this, are you -- what were you trying to get  
24 to in your question there?

25 A. Well, I was wondering if you was going to

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1 have anything to say.

2 Q. And what if I didn't?

3 A. He -- he explained it.

4 Q. And I'm not going to saying I --

5 A. He said it's all --

6 Q. -- I'm not saying I won't, but what if I  
7 didn't, would it bother you?

8 A. I have to hear what he has to say and make a  
9 decision based on that, but I would certainly think  
10 that you would have something to say.

11 Q. Okay. But you understand I don't have to.

12 A. Right, I understand that.

13 Q. We're the ones being accused. They're the  
14 ones bringing the charge. It's their burden. We  
15 don't have to do anything. We don't have to say  
16 anything. That's our Fifth Amendment right. Do you  
17 believe in that?

18 A. Yes, I do.

19 Q. Okay. Or do you -- and you can tell us if  
20 you feel otherwise, if you feel like, "Well, you know,  
21 if somebody is accused of a pretty serious crime and  
22 they're looking at the death penalty I think they  
23 better tell me a little bit about what's going on  
24 here."

25 A. I would think so.

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1 Q. Is that the way you feel?

2 A. Yes.

3 Q. So honestly, honestly speaking, if that's the  
4 way you feel, then you have a certain bias about this  
5 case. You would want to hear something from our  
6 client, you would want to hear something that would  
7 help you understand why you he did it.

8 A. Certainly. I want to hear both sides.

9 Q. But you understand that that's not the law.

10 A. That's not the law. I know that.

11 Q. But you would still have that feeling or have  
12 that -- that leaning, that inclination that would, and  
13 could possibly, --

14 A. Yes.

15 Q. -- hinder your ability to take the oath in  
16 this case possibly; or hinder your ability to serve as  
17 a fair and impartial juror in this case. Would that  
18 be fair safe to say?

19 A. Uh-huh.

20 Q. You understand what I'm trying to tell you?

21 A. Yes. You're trying to tell me that you don't  
22 have to say anything. But what I just said was I  
23 would like to hear both sides of the story and...

24 Q. Okay.

25 A. But I, you know --

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1 Q. Well, let me -- let me just finish asking  
2 you.

3 A. Okay.

4 Q. Say you don't. Say you don't. Is that  
5 something that is going to fall -- in your  
6 decision-making process, is it going to fall in their  
7 column or is it going to fall in our column?

8 A. Well, you -- the law was read to me.

9 Q. And we need truthful, honest answers, Mr.  
10 Moser.

11 A. Oh, yeah.

12 Q. Okay? And, you know, like we said, if -- you  
13 know, we need to know this.

14 A. Huh. I -- I could listen to the burden of  
15 proof. You got me trapped.

16 Q. Well, I don't really. I just -- and I'm not  
17 trying to corner you, but do need to know how you feel  
18 about it.

19 A. Yeah.

20 Q. And some people do, and that's okay. It's  
21 absolutely okay. It's human nature, I think, quite  
22 honestly. Even though we sit here as lawyers day in  
23 and day out trying to try these cases, and we ask that  
24 question of people and they say they understand the  
25 concept, but they still say, "Yeah, but you know what?



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1 I just don't know how that I can -- I can honestly  
 2 make a decision if I don't hear from the other side."  
 3 A. Yeah, I agree with you.  
 4 Q. And that's what we need to know. Do you  
 5 agree with that?  
 6 A. Yeah.  
 7 MR. GARZA: Your Honor, can we have a  
 8 hearing outside the presence of the juror?  
 9 MR. SKURKA: May I have just a couple of  
 10 follow-up questions, Judge?  
 11 THE COURT: Yeah, you may, but...  
 12 VOIR DIRE EXAMINATION  
 13 BY MR. SKURKA:  
 14 Q. Mr. Moser, are you saying that you would have  
 15 to hear from them before you can make a decision in  
 16 this case?  
 17 A. Well, I was thinking there for a while that I  
 18 could hear the burden of proof from your side --  
 19 Q. Uh-huh.  
 20 A. -- but the way he phrased the question, it  
 21 kind of caught me off guard, and I -- you know, I'm  
 22 not saying that you wouldn't give me all the  
 23 information, but if I'm making a decision based on a  
 24 man's life I want to hear all of the evidence.  
 25 Q. So would you require them to put on

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1 something?  
 2 A. I would think they would.  
 3 Q. Okay. You understand that's not the law,  
 4 though.  
 5 A. I understand that's not the law.  
 6 Q. But that would interfere with you?  
 7 A. That's -- I don't have an answer for that.  
 8 MR. SKURKA: Okay, Judge, that's all the  
 9 questions I have.  
 10 THE COURT: Okay. Why don't you wait in  
 11 the jury room for a second, Mr. Moser --  
 12 VENIREPERSON NO. 48: Okay.  
 13 THE COURT: -- while I speak with these  
 14 guys.  
 15 (Venireperson exits courtroom.)  
 16 THE COURT: All right, Mr. Garza?  
 17 MR. GARZA: Challenge for cause.  
 18 THE COURT: Sustained.  
 19 MR. GARZA: Thank you, Your Honor.  
 20 MR. SKURKA: You're always confusing  
 21 these people, Ed.  
 22 THE COURT: Bring him on in.  
 23 (Venireperson enters courtroom.)  
 24 THE COURT: All right. Mr. Moser, you  
 25 were not selected to be on this jury. We do

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1 appreciate your time coming down here and sharing your  
 2 thoughts with us. Thank you very much for your  
 3 honesty.  
 4 VENIREPERSON NO. 48: Thank you, sir.  
 5 MR. GARZA: Thank you.  
 6 MR. SKURKA: Thank you, sir.  
 7 (Venireperson exits courtroom.)  
 8 MR. SKURKA: I don't know if you want  
 9 to get this on the record or not, Judge, but we have  
 10 one tomorrow that we've already agreed on --  
 11 THE COURT: Oh, what number is that?  
 12 MR. GARZA: No. 59.  
 13 MR. SKURKA: No. 59.  
 14 MR. GARZA: Ms. -- Ms. Rutter.  
 15 Apparently, she has a hearing impairment, Your Honor,  
 16 that will probably preclude her from being a --  
 17 THE COURT: Okay. Then 59 is excused by  
 18 agreement. I don't think -- I think Ann took it off  
 19 the list.  
 20 (Evening recess.)  
 21  
 22  
 23  
 24  
 25

1 THE STATE OF TEXAS )

2 COUNTY OF NUECES )

3

4

5 I, Mary Lopez Buitron, Official Court Reporter  
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12 occurred in open court or in chambers and were reported by me.

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14 the proceedings truly and correctly reflects the exhibits, if  
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19 WITNESS MY OFFICIAL HAND this the 4th day of  
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